TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946 47

No. 1003 39

AERO MAYFLOWER TRANSIT COMPANY,
APPELLANT,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

FILED FEBRUARY 10, 1947.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 18, 1947.

[fol. 1] [Caption omitted]

[fol. 2]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF SILVER BOW

No. 38175

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, Paul T. Smith, Horace F. Casey and Austin B. Middleton, as Members of and Constituting the Board of Railroad Commissioners of the State of Montana, Plaintiffs,

vs.

AERO MAYFLOWER TRANSIT COMPANY, a Corporation, Defendant

COMPLAINT—Filed October 13, 1939

The plaintiffs for their cause of action against the defendant allege:

I

That plaintiff Board of Railroad Commissioners of the State of Montana is and at all times herein mentioned has been a public board and body and one of the official commissions and departments of government of the State of Montana duly created and existing under and by virtue of the laws thereof; that Paul T. Smith, Horace F. Casey and Austin B. Middleton are the duly elected, qualified and acting members of the Board of Railroad Commissioners of the State of Montana and bring this action on behalf of the State of Montana.

II

That the Aero Mayflower Transit Company is a corporation organized and existing and doing business under and by virtue of the laws of the State of Indiana.

III

That by virtue of the authority vested in and conferred [fol. 3] upon plaintiff Board of Railroad Commissioners of the State of Montana and its members as aforesaid by

Chapter 184 of the Laws of Montana the Twenty-second Legislative Assembly of the State of Montana, 1931, and the laws amendatory thereof, said Board is vested with power and authority and jurisdiction to supervise and regulate every motor carrier in the State of Montana as defined in the aforesaid Chapter 184.

IV

That under the terms of said Chapter 184, Laws of 1931, every person, firm or corporation who is engaged in or engages in the operation of motor vehicles upon any public highway in the State of Montana for the transportation of persons and/or property for hire on a commercial basis either as a common carrier or under private contract, charter, agreement or undertaking, is designated as a motor carrier and as such is required to apply for and secure a certificate of public convenience and necessity from the aforesaid Board before he, they or it can operate any motor vehicles upon the public highways of the State of Montana for the transportation of freight, express or passengers for hire.

V

That on or about the 12th day of October, 1939, the defendant, Aero Mayflower Transit Company, operated and is now operating for public service within the State of Montana motor vehicles for the transportation of property for hire on a commercial basis and in so doing is transporting property belonging to third persons for hire on a commercial basis, as a common carrier or under private contract, agreement and undertaking over and upon the public highways of the State of Montana.

VI

[fol. 4] That at no time mentioned in this complaint and at the time of the filing of this complaint has the defendant, Aero Mayflower Transit Company, a franchise, permit or certificate of public convenience and necessity authorizing it, the said Aero Mayflower Transit Company to transport property by motor vehicles over or on the public highways of the State of Montana as a motor carrier or at all, or for hire on a commercial basis, and that said defendant, Aero Mayflower Transit Company, does not now have and has not had at the time herein mentioned or at all, such franchise,

permit and certificate of public convenience and necessity; and plaintiffs allege that the defendant, Aero Mayflower Transit Company, has refused to abide by the rules and regulations of the State of Montana and the laws of the State of Montana in order to permit it to operate as a motor carrier over the public highways of the State of Montana and that it intends to continue operating motor vehicles for transportation of property for hire on a commercial basis on the public highways of the State of Montana without such franchise, permit or certificate of convenience and necessity and that unless restrained by order of this court the said defendant will continue to operate motor vehicles over the public highways of the State of Montana, for the transportation of property for hire on a commercial basis and as a common carrier or under private contract, agreement or undertaking; that plaintiffs further allege that such actions of the defendant hereinbefore set forth result in an unlawful and unauthorized use of the public highways of the State of Montana, all to the great and irreparable damages of the State of Montana and the people thereof in the maintenance and operation of adequate and well regulated systems of transportation and results in the citizens of the State of Mon-
[fol. 5] tana, being without adequate or any protection against the negligent operation of motor vehicles operated by the said defendant, Aero Mayflower Transit Company, as hereinbefore set forth and described, and, furthermore, such action of the defendant as heretofore described results in great and irreparable damage to duly licensed motor carriers in the State of Montana who have complied with the Motor Carrier Laws of this State and particularly with Chapter 184 of the Laws of Montana of the Twenty-second Legislative Assembly of the State of Montana, 1931, and the laws amendatory thereof; that such actions of the defendant places an undue burden on the public highways of the State of Montana and results in great and irreparable damages to the citizens of the State of Montana and the duly licensed motor carriers in said State in that the defendant seeks to use the public highways of Montana for pecuniary gain without contributing its share of fees for the construction, maintenance, operation and regulation of the public highways of the State of Montana as provided for by the laws of the State of Montana relating to motor carriers.

VII

That plaintiffs are without any adequate or speedy remedy at law for the wrongs and injuries to the public herein complained of and practiced against the public by the said defendant, and that this action is brought pursuant to the provisions of Section 14, Chapter 184, Laws of 1931, authorizing the Board of Railroad Commissioners of the State of Montana to apply to any court of competent jurisdiction in any county where a motor vehicle is engaged in business, for the enforcement of said Chapter 184, Laws of 1931, and the rules, regulations and orders of this Board made pursuant thereto.

[fol. 6] Wherefore, plaintiffs pray that the defendant, Aero Mayflower Transit Company, its agents, servants and employees and all persons acting by, through or under it be permanently enjoined and restrained from operating motor vehicles upon any public highways in the State of Montana for the transportation of property for hire on a commercial basis, either as a common carrier or under private contract, charter, agreement or undertaking until such time as it has complied with the provisions of Chapter 184, Laws of 1931 and the laws amendatory thereto, and the rules and regulations of the Board of Railroad Commissioners of the State of Montana adopted thereunder; that an order to show cause be issued requiring the defendant to appear at a time and place therein specified to show cause if any it may have why it should not be enjoined in like manner during the pendency of this litigation, and that a temporary restraining order to like effect issue and remain in effect until final hearing and decision upon plaintiffs' complaint for permanent injunction; and for plaintiffs' costs of suit and disbursements herein necessarily incurred.

Harrison J. Freebourn, Attorney General of the State of Montana; W. E. Coyle, W. B. F., County Attorney of Silver Bow County, Montana; John W. Bonner, Counsel, Board of Railroad Commissioners of the State of Montana, Attorneys for Plaintiffs.

[fol. 7] IN THE DISTRICT COURT, SILVER BOW COUNTY

DEMURRER—Filed October 31, 1939

Comes now the defendant Aero Mayflower Transit Company, a corporation, and expressly reserving and saving to itself all of its rights to resist the alleged order to show cause returnable herein on November 6, 1939, and to move against the temporary restraining order heretofore issued herein, demurs to the complaint of plaintiffs herein upon the following grounds:

I

That the plaintiff Board of Railroad Commissioners of Montana, and the individuals constituting the same and attempting to sue as such Board, do not have the legal capacity to sue in that said Board is the creature of Ch. 37, Laws 1907, as amended (Sections 3779-3817, R. C. M. 1935) possessing only the powers granted thereby or necessarily and directly implied therefrom, and by the provisions of Section 3806, Revised Codes of Montana, 1935, the action or proceeding must be by and in the name of the State of Montana.

II

That there is a defect of parties plaintiff in that the State of Montana is a necessary and indispensable party plaintiff pursuant to the provisions of Section 3806, Revised Codes of Montana, 1935, and Section 3847.14, Revised Codes of Montana, 1935.

III

That said complaint fails to state facts sufficient to constitute a cause of action against this defendant, and/or to warrant the issuance of a temporary restraining order, or any other injunctive process against defendant, in that:

[fol. 8] (1) Said complaint fails to state facts showing that defendant is in any respect subject to the alleged jurisdiction of the said Board of Railroad Commissioners.

(2) Said Chapter 184, Laws 1931, ferred to in said complaint, shows on its face that defendant is not subject to the asserted jurisdiction of said Board.

(3) Said complaint fails to state any fact or facts whatsoever showing that defendant's acts result in irreparable, or any injury, to any one.

(4) Said complaint fails to contain any fact or facts justifying the intervention of a court of equity.

IV

Said complaint and the affidavit served therewith fail to state facts sufficient to warrant the intervention of a court of equity by way of a temporary restraining order granted without notice as was done herein, or by way of temporary injunction, or by way of permanent injunction, or at all.

Done and Dated October 30, 1939.

E. G. Toomey, Toomey, McFarland & Chapman, Attorneys for Defendant.

IN THE DISTRICT COURT, SILVER BOW COUNTY

ORDER OVERRULING DEMURRER OF DEFENDANT—Minute Entry of January 20, 1940

This day the demurrer of the defendant to plaintiff's Complaint, herein, heretofore heard and submitted and by the Court taken under advisement, is overruled and said defendant is given twenty (20) days to answer said complaint.

IN THE DISTRICT COURT, SILVER BOW COUNTY

[fol. 9] ANSWER AND CROSS-COMPLAINT OF DEFENDANT—Filed March 11, 1940

Comes now Aero Mayflower Transit Company, a corporation, and for its answer to the complaint of plaintiffs, admits, denies and alleges as follows:

I

Answering paragraph I of said complaint, defendant admits all the allegations thereof except that defendant denies that plaintiffs bring this action on behalf of the State of Montana, and allege that plaintiffs bring this action on their own initial motion, absent any order or direction by the Governor or by the Attorney General of the State of

Montana authorizing or directing the institution of this action.

II

Answering paragraph II of said complaint, defendant admits that it is a corporation organized and existing under and by virtue of the laws of the State of Kentucky; defendant denies that it is a corporation organized and existing under or by virtue of the laws of the State of Indiana.

III

Answering the allegations of paragraph III of said complaint, this defendant denies the same.

IV

Answering the allegations of paragraph IV of said complaint, this defendant denies the same.

V

Answering the allegations of paragraph V of said complaint, this defendant denies the same.

VI

Answering the allegations of paragraph VI of said complaint, this defendant denies the same.

[fol. 10]

VII

Answering the allegations of paragraph VII of said complaint, this defendant denies the same.

VIII

Answering, further, said complaint, this defendant denies each and every allegation in said complaint not hereinbefore specifically admitted or denied.

Further and Affirmative Defense and Cross-Complaint

Comes now the defendant above named herein for brevity called the carrier, and for its further and affirmative defense, and also by way of cross-complaint against plaintiffs herein, hereinafter referred to as the Board, shows to the court:

A

The carrier is, and has been since September, 1928, a corporation organized and existing under and pursuant

to the laws of the State of Kentucky, with its principal office in the City of Indianapolis, State of Indiana; that it owns and operates a fleet of motor trucks, inclusive of the trucks occasionally within the State of Montana as hereinafter referred to, all of which are licensed under the laws of the State of Indiana, and carry at all times license plates of the State of Indiana; that its business is that of transporting by motor vehicle, in interstate commerce only, over the highways of the United States used household goods and office furniture, incident only to the change of residence of the owner of such goods, under a separate order for such transportation and given in each instance by or on behalf of the owner of said goods, at the rate for such transportation set out in its schedule of rates on file with the Interstate Commerce Commission of the United States. That each shipment is transported under a separate contract [fol. 11] therefor, and may be from any point in the United States to any other point in the United States, so long as the point of destination is in a state other than the state within which the shipment originates. That the carrier does not operate its motor trucks, or any of them, on any fixed schedule, or over any regular routes. Shipments of furniture from without the state are transported to and delivered to points within the state, or shipments of furniture originating within the state are transported to points without the state, or shipments of furniture in transit are transported through the state, or motor trucks without load are driven through the state. That carrier never has done and does not now do or carry on and has no intention of carrying on hereafter any intrastate business in the State of Montana and that its operations with respect to the State of Montana have at all times been interstate operations into, out of, across or through said State. That it has been granted, and now operates under, Permit No. 2934 issued to it by said Interstate Commerce Commission, under and pursuant to the provisions of the Federal Motor Carrier Act of 1935, as a common carrier.

B

That the plaintiff Board of Railroad Commissioners of the State of Montana is an administrative tribunal of the State of Montana, created by an act (Chapter 37, Laws of Montana, 1907, now as amended, Sections 3779-3817 Revised

Codes of Montana, 1935) of the Legislative Assembly of Montana, with power to sue in the name of the State of Montana and to be sued in the courts of the United States and of the State of Montana.

The plaintiffs Paul T. Smith, Horace F. Casey and Austin B. Middleton, are the duly and regularly elected, [fol. 12] qualified and acting members of and constitute the said Board of Railroad Commissioners of Montana, established by the act aforesaid.

The said Board has by the terms of said original act (Sec. 16, Ch. 37, Laws 1907, now Sec. 3797 Revised Codes of Montana, 1935) general supervision of all railroads, express companies, car companies, sleeping-car companies, freight and freight line companies, engaged in the transportation of passengers or property in intrastate commerce within the State of Montana, inclusive of regulation of the intrastate rates and services of such carriers.

The said Board was by an act (Ch. 52, Laws of Montana, 1913, now as amended, Sections 3879-3913, Revised Codes of Montana, 1935) of the Legislative Assembly of Montana, made ex-officio, the Public Service Commission of the State of Montana and invested with the power to supervise and regulate the operations of persons, firms, associations or corporations, private or municipal, producing, delivering or furnishing for or to the persons, heat, street-railway service, light, power in any form or by any agency, water for business, manufacturing, household use, or sewerage service, telegraph or telephone service, to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village.

The said Board was by an act (Chapter 63, Laws of Montana, 1913, now as amended, Sections 3859-3878 Revised Codes of Montana, 1935) of the Legislation Assembly of Montana further invested with powers to inspect, regulate and supervise steam vessels, other boats propelled by machinery, sailing craft, ferry boats and barges on the navigable waters of the State of Montana, and house boats, captains and pilots engaged in the carrying of passengers [fol. 13] and freight on said waters, and enforce safety regulations applicable to such boats, captains and pilots.

The said Public Service Commission was by an act of the Legislative Assembly of Montana (Ch. 109, Laws 1927, now as amended, Sections 3913.1-3913.24, Revised Codes

of Montana, 1935) invested with power to license all persons, firms and corporations in Montana, engaged in the business of refining, manufacturing, or keeping for sale any gasoline, kerosene, distillate, road oil, fuel oil, lubricating oils and greases, inspecting such products, testing the same and enforcing standards of quality and strength with respect thereto.

The said Board was by an act of the Legislative Assembly of Montana (Ch. 223, Laws of Montana, 1919, now as amended, Sections 3914-3946 Revised Codes of Montana, 1935) made ex-officio, the Montana Trade Commission, with power to fix rules, charges, rates, tolls and maximum profits of public mills as defined in said act, i.e., elevators, mills, factories, milling, manufacturing or producing flour, bran, mill-feed, or products or commodities of any kind, from wheat, oats, or other grain.

The said Montana Trade Commission was by an act of the Legislative Assembly of Montana (Ch. 80, Laws of Montana, 1937, not integrated in the Revised Codes of Montana, 1935) made administrator of the "Unfair Practices Act" of the State of Montana, with power thereunder to prevent unfair competition and discrimination, or sales below cost, among sellers of merchandise in the State of Montana, in violation of principles, practices and standards prescribed by said act.

The said Board was by an act of the Legislative Assembly of Montana (Ch. 8, Laws of Montana, Extra Session 1921, [fol. 14] now Sections 3848-3858 Revised Codes of Montana, 1935) invested with power to regulate and supervise the operations, services, rates and charges of all persons, firms and corporations owning or operating any pipe line within the State of Montana, for the transportation of crude petroleum to or for the public for hire, or engaged in the business of transporting crude petroleum.

The said Board was by an act of the Legislative Assembly of Montana (Ch. 184, Laws of Montana, 1931, now as amended, Sections 3847.1-3847.28, Revised Codes of Montana, 1935) vested with power and authority to supervise and regulate every motor carrier in the State of Montana, as in said act defined, viz.,

"The term 'motor carrier', when used in this act, means every person or corporation, their lessees, trustees, or receivers appointed by any court whatsoever, operating motor

vehicles upon any public highway in the state of Montana, for the transportation of persons and/or property for hire, on a commercial basis either as a common carrier or under private contract, agreement, charter, or undertaking; provided that nothing in this act shall be construed as affecting the operation of school busses which are used in conveying school children to and from district or other schools, or to the transportation of freight or passengers by motor vehicles when done occasionally and not as a regular business, or to the transportation by means of motor vehicles in the regular course of business of employees, supplies and materials by any person, firm or corporation engaged exclusively in the construction or maintenance of highways, or engaged exclusively in logging or mining operations, insofar as the use of employees, supplies and materials in construction and production is concerned."

[fol. 15] That none of said acts have been repealed and said Board assumes to and does daily administer each thereof and enforce, and threaten the enforcement of each thereof upon the persons, firms and corporations subject thereto, all of said plaintiff members of said Board daily devoting their time to different duties under said various administrative heads in the multiple areas of official activity assigned and delimited by the Legislative Assembly of the State of Montana to said Board, and using and employing the monies in the Motor Carrier Fund of said Board, hereinafter referred to, for their various official activities under the said multiple adininistrative heads.

C

That under date of October 3, 1935 the Board of Railroad Commissioners of the State of Montana, assumed to and did issue to this carrier its certificate sometimes styled "Permit", No. 1354, for interstate operations only, assuming and pretending to act pursuant to the provisions of said Chapter 184, Session Laws of 1931, of the State of Montana, which "permit" assumed to grant to this carrier the right to transport property as a common carrier in interstate service by motor vehicles for hire, over and on the public highways of the State of Montana, and which "permit" remained in full force and effect until the 9th day of October, 1939, on which latter date the said Board assumed and pretended to issue an order, purporting to cancel and

terminate said certificate, or "permit". That the "permit" so issued by the Board related to that class known as "Class C Motor Carriers" as defined in said Chapter 184 of the Session Laws of 1931.

That under date of September 19, 1939 the Board of Railroad Commissioners of the State of Montana assumed [fol. 16] to and did issue an order directing the carrier herein to appear before it on October 6, 1939 to show cause, if any, why any right or rights, permit or permits granted it by said Board to operate as a Motor Carrier over the public highways of the State of Montana should not be revoked and cancelled, a copy of said order to show cause, marked Exhibit "A", being attached hereto, and by reference, made a part hereof the same as if fully written out herein.

That on October 6, 1939, this carrier appeared before said Board and filed its written return to said order to show cause, a copy of said return, marked Exhibit "B", being attached hereto and by reference made a part hereof the same as if fully written out herein; and then and there at the hearing thereon, there was offered by this carrier and received in evidence sworn credible and substantial testimony in support of said return, and no other evidence was offered by any person or interest, or received at said hearing by said Board.

That under date of October 9, 1939, the Board issued an order purporting and pretending to cancel and terminate carrier's "permit" issued as aforesaid, a copy of said purported order of cancellation and termination, marked Exhibit "C", being attached hereto and by reference made a part hereof the same as if fully written out herein and therewith advised carrier that any attempt on its part to operate its vehicles over the highways of Montana in the interstate commerce aforesaid, would result in seizure, impoundment and confiscation of its trucks, arrest and trial of its drivers whenever and wherever any of said trucks with drivers were found on the highways of Montana, and the repeated attempt by said Board at infliction of fines and penalties for each and every daily movement of trucks and [fol. 17] drivers. Upon receipt of notice of such purported order of termination and cancellation of its permit in Montana, carrier to avoid the seizure and impoundment of its trucks, delays, detentions and conversions of loads in transit, fines and penalties provided in said Chapter 184, Laws

1931, ceased its operations in interstate commerce into, out of or across the said State of Montana, except with respect to three of its trucks which at the time of receipt of said order were then already in, or nearing, the State of Montana, and which trucks completed the shipments then in actual transit. Since the completion of said shipments so in transit at said time, the carrier did not operate, or attempt to operate any of its trucks or equipment in interstate commerce into, out of or across the said State of Montana, until subsequent to December 5, 1939, as hereafter appears. That this carrier thereupon commenced the preparation of litigation in its behalf, when it was served on or about October 15th, 1939 with the thirty day temporary restraining order herein in this action commenced by the Board on October 13, 1939. That on the date of the issuance of the temporary restraining order in this case, to-wit, on October 13, 1939, as aforesaid this carrier was not operating any of its trucks or equipment into, out of or across the said state of Montana or within the boundaries of the state of Montana and it did not operate *of* such trucks or equipment within the boundaries of the state of Montana following the issuance of the restraining order herein, until sometime subsequent to December 5, 1939, following dissolution of said restraining order by the above entitled court after hearing upon application of this carrier, said order of dissolution being conditioned on delivery of $5000.00 bond by this carrier as [fol. 18] appears in the files herein, for the protection of the tax demands of said Board.

D

Use of Montana Highways by Carrier

1937: This carrier alleges that during the calendar year of 1937 twenty-five (25) different pieces of equipment of various weights and sizes, entered, crossed, or went out of the State of Montana, all in interstate commerce exclusively, the same bearing Indiana license plates numbered 3867, 3888, 3919, 3922, 3856, 3874, 3930, 3923, 3858, 3859, 3902, 3905, 3906, 3908, 3915, 3921, 19710, 2906, 3860, 3889, 3938, 19727, 141594, 141671, respectively; that one or more of said motor vehicles entered, crossed or went out of the State of Montana more than once during the said calendar year of 1937 as follows:

Six pieces of such equipment made only one trip each, into, out of, or through the state of Montana; ten different pieces of such equipment made two trips each, 1 made three trips, 3 made four trips, 2 made five trips and 3 made eight trips into, out of or through the State of Montana during the year 1937. The total number of days or parts of days during the year 1937 that all of such equipment made any use of the highways of Montana, was 227 days, or an average use per day of Montana highways in interstate commerce throughout the year 1937 by any single piece of equipment, of eight (8) days. That all of said several pieces of equipment traveled 227 days during said calendar year 1937 in entering, crossing, or going out of the said State of Montana, that all of said several pieces of equipment traveled in interstate commerce exclusively 10,077 empty, and 27,205 loaded, miles, a total of 37,265 miles, within the boundaries of the State of Montana for said year of 1937.

[fol. 19] 1938: *This carrier alleges that during the calendar year* 1938 forty (40) different pieces of its motor equipment of various weights and sizes, entered, crossed or went out of the State of Montana, all in interstate commerce exclusively, the same bearing Indiana license plates numbered 3280, 3284, 3298, 3321, 3328, 3327, 3338, 3355, 3364, 3365, 3379, 3231, 3303, 3324, 3340, 3342, 3353, 3354, 3356, 3360, 3361, 3366, 3367, 3372, 3376, 3382, 3275, 3301, 3308, 3348, 3351, 15811, 941, 3222, 3273, 3330, 3368, 3384, 15820, and 3375, respectively; that some of said several pieces of equipment entered or left or crossed the state of Montana more than once during said calendar year as follows:

Ten different pieces of such equipment made two trips each, 8 made three trips each, 5 made four trips each, 1 made five trips, 1 made six trips, 1 made seven trips, 3 made eight trips each and 1 made fifteen trips into, out of or through the State of Montana during the year 1938. The total number of days or parts of days during the year 1938 that all of such equipment made any use of the highways of Montana, were 385, or an average use per day of Montana highways in interstate commerce throughout the year 1938 by any single piece of equipment, of nine days. That all of said pieces of equipment traveled 385 days during the said calendar year of 1938 in entering, crossing or going out of the said State of Montana; that all of said pieces of equipment traveled in interstate commerce exclusively 18,642 empty, and 44,254 loaded, miles, a total of 62,896

miles within the boundaries of the State of Montana during said calendar year 1938.

1939: *This carrier alleges that during the calendar year of 1939* forty-four (44) different pieces of its motor equipment of various weights and sizes, entered, crossed or [fol. 20] went out of the State of Montana, all in interstate commerce exclusively, and all bearing Indiana license plates 4676, 4620, 4635, 4636, 4641, 4643, 4645, 4649, 4314, 4660, 4674, 4681, 4688, 4689, 4694, 4704, 4706, 4708, 4710, 4712, 4714, 4717, 4724, 4728, 4729, 4730, 4732, 4735, 4736, 4737, 4738, 4740, 4742, 4743, 4751, 4753, 4755, 4756, 4757, 4759, 4760, 15427, 15428, 15430; that some of said several pieces of equipment entered or left or crossed the State of Montana more than once during said calendar year as follows:

Nineteen different pieces of such equipment made one trip each, 7 made two trips each, 4 made three trips each, 4 made four trips each, 4 made five trips each, 4 made six trips each, 1 made seven trips and 1 made eight trips, into, out of or through the State of Montana during the year 1939.

That all of said pieces of equipment traveled 405 days during said calendar year of 1939 in entering, crossing or going out of the said State of Montana, that all of said pieces of equipment traveled in interstate commerce exclusively 18,617 empty, and 47,847 loaded, miles, a total of 66,464 miles within the boundaries of the State of Montana during said calendar year 1939. The total number of days or parts of days during the year 1939 that all of such equipment made any use of the highways of Montana was 405, as aforesaid, or an average use per day of Montana highways in interstate commerce for said period by any single piece of equipment of nine days.

That defendant refused and continues to refuse to pay said fees to said plaintiff Board as prescribed by said Chapter 184, Laws 1931 and said Chapter 100, Laws of 1935.

E

Taxes Demanded by State of Montana for Alleged Highway Use and Paid by Carrier

[fol. 21] (1) This carrier further alleges that pursuant to the provisions of Sections 1760-1760.10, Revised Codes of Montana, 1935, it has during each of the years 1937, 1938 and 1939 at and upon the demand of the license tax officers of the State of Montana, registered and licensed the afore-

said pieces of its equipment which entered the State of Montana during each of said years; that for such registration and license plates of the State of Montana it paid to the State of Montana for the year 1937 the sum of $660.50, for the year 1938 the sum of $1212.52 and for the year 1939 the sum of $1630.50; that said sums so paid for said registration and license plates were payable, and paid, as compensation for the use by this defendant of highways in and of the State of Montana; that by the express terms of said statutes all of such registration and license plate fees are appropriated and allocated to a fund to be used by subdivisions of, and in, the State for the construction, repair and maintenance of highways in the State of Montana.

(2) This carrier further alleges that, in addition to the license taxes and exactions aforesaid demanded by the State of Montana from this carrier, for the use of Montana highways in the conduct of the interstate business of this carrier, this carrier pays to the State of Montana further and additional taxes for the operation of its motor vehicles, into, out of, through or across the State of Montana, in this, to-wit:

Chapter 95, Laws of Montana, 1931 (Sections 2381.1-2396.9 Revised Codes of Montana, 1935, followed by Initiative Measure No. 41, adopted by a vote of the people of Montana at a general election held November 8, 1938, effective by virtue of proclamation of the Governor of Montana on November 13, 1938, known as "The State Highway Treasury Anticipation Debentures Act of 1938" provide an [fol. 22] excise or license tax for the privilege of engaging in or carrying on the business of refining, manufacturing, producing, impounding or selling, shipping, transporting, importing and distributing gasoline for use in motor vehicles, of five (5c) cents per gallon, which tax is intended to be and in practice is, exacted from every buyer and purchaser of gasoline in the State of Montana and this carrier in the conduct of its interstate transportation business into, out of, across and through the State of Montana, purchases large quantities of said gasoline upon which it pays at and upon the demand of the collectors thereof directly, and at the instant of purchase, the said tax of five (5c) cents per gallon, all of the proceeds of which taxes are used by the State of Montana for the construction, preservation and maintenance of the roads and highways

of the state, including the Federal Aid Highway system in Montana, and all of which proceeds are, in addition, pledged to the payment of said state highway treasury anticipation debentures, under the Initiative act aforesaid, issued to borrow money for the construction, betterment and maintenance of the state highways and roads of the State of Montana, including the federal aid system. In the year 1937 this carrier paid an approximate total of $745.30 to the State of Montana for such gasoline taxes, for the year 1938 an approximate total of $1257.92 and for the first ten months of the year 1939 to the date of suspension of its operations by said restraining order an approximate total of $1649.98 for such gasoline taxes.

The moneys paid by this carrier to the State of Montana, Motor Vehicle License Department, and to the State of Montana, for such Gasoline Excise Highway Debenture tax, exceeded in the years 1937 and 1938, two cents for every mile traveled via motor vehicle operated by this carrier in [fol. 23] interstate commerce over the highways of Montana and in the year 1939, exceeded two and one-half cents for every like mile. That such charges so collected by said departments of the government of said state constitute and are more than a reasonable compensation to be paid by this carrier for the occasional use of Montana highways in interstate commerce or for any other benefit received by this carrier from said State of Montana or any department thereof. That a portion of such license plate and gasoline tax charges is excessive and unreasonable and the same, together with any additional charges sought to be collected by the Board herein, constitute and are, and if collected in the future, will be, unreasonable, oppressive and unconstitutional burdens upon interstate commerce as conducted by this carrier in that charges do and will exceed any proportionate benefit or advantage or protection to this carrier, and further, in that said taxes are not measured by and bear no fair relationship to the use of the highways for which the charge is made, in violation of the commerce clause of the Constitution of the United States, as hereinafter is more particularly pleaded.

That due to the sparsely settled character of the State of Montana and its relatively small populace, viz., 535,000 persons scattered over 146,000 square miles and due, further to the fact that vast districts are not populated to any

extent, and to great distances between populated centers, it is difficult to obtain a return load out of Montana because of the lack of business for this carrier originating in said state. The total miles traveled by carrier's motor vehicles in interstate commerce in Montana in 1937 and 1938 and for the first ten (10) months of 1939 did not equal the aver- [fol. 24] age mileage per year per truck throughout the United States of America for carrier's operations. The total number of days all trucks of carrier were in the State of Montana, traveling loaded or unloaded, averaged a little in excess of one truck per each day of these years; and the empty mileage traveled in the State of Montana in 1937 was 37%, in 1938 was over 42%, and for the first ten months of 1939, 40% of total mileage traveled in Montana against like percentage for the United States of 25%.

This carrier alleges that a fair and reasonable charge as compensation for the right of using the highways of the State of Montana in conducting its business in interstate commerce is much less than the per traveled mile cost set forth above. The amounts of money paid by this carrier for registration, license plates and gasoline excise highway debenture taxes, and the application of such funds to the highways of the State of Montana, including the Federal Aid Highway system, constitute and are more than a fair and just compensation to the State of Montana for the use of its highways by this carrier in its operations in interstate commerce. That said Board, by its action in making the said Order complained of herein, is attempting to prevent this carrier from exercising its right to engage in interstate commerce, as aforesaid, when this carrier has paid much more than a fair and reasonable compensation to the motor license department and the highway department of the State and for permission granted to so operate within the State in interstate commerce over the highways and is in fact endeavoring to tax this carrier directly for the privilege of operating in interstate commerce.

That during the year 1937 this defendant's vehicles traveled a total of 7,826,046 miles throughout the United States, [fol. 25] in 1938 a total of 8,348,558 miles and for the first nine months of the year 1939 a total of 6,818,501 miles; that the average cost for each of said traveled miles throughout the United States in said periods for license fees, gasoline taxes, commission permits, property taxes and all other

taxes, charges of every kind and character, was slightly less than 1¢ per traveled mile.

G

Taxes Demanded by Use of Alleged Compensation For Highway Use but Not Paid by Carrier

That the fees demanded by the plaintiff Board of this carrier, referred to in its order of September 19, 1939, to show cause, and in its order of October 9, 1939, purporting to terminate and cancel the said Montana Certificate or "Permit" No. 1354 of this defendant (Paragraph C of this Defense and Cross-Complaint and Exhibits "A" and "C" hereto attached) are:

(1) Those prescribed by Sections 16 and 17 of said Chapter 184 of the Session Laws of 1931, (now Sections 3847.16-3847.17, R.C.M. 1935), reading as follows:

"(a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars ($10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state.

"Provided, that a motor carrier engaged in seasonal [fol. 26] operations only, where its said operations do not extend continuously over a period of not to exceed six (6) months in any calendar year, shall only be required to pay compensation and fees in a sum equal to one-half (½) of the compensation and fees herein provided, and provided further, that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by a motor carrier as standby or emergency equipment. The board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as standby or emergency equipment.

"(b) When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the

making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.

"(c) Upon the failure of any motor carrier to pay such compensation, when due, the board may in its discretion revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid."

. . . . . .

3847.17. "All of the fees and compensation charges collected by the board under the provisions of this act shall be transmitted to the state treasurer who shall place the [fol. 27] same to the credit of a special fund designated as 'motor carrier fund'; such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the businesses herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the 'motor carrier fund.' Such fund shall not come within the restriction of any law of this state governing payment of expense incurred in a previous year, it being intended that such fund shall be applied to the payment of any necessary costs or expenses in carrying out the provisions of this act, whether incurred during the ensuing year or previous fiscal years, and such 'motor carrier fund' or accumulations thereof, are hereby appropriated for the payment of the costs and expenses rendered necessary in the carrying out of the provisions of this act." and, in addition to the above,

(2) Those described by Sections 2 and 3 of Chapter 100, Laws of Montana, 1935, an Act approved March 14, 1935 (now Sections 3847.27 and 3847.28, R.C.M. 1935) reading as follows:

3847.27. "In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in

consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of [fol. 28] one-half of one per cent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars ($30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars ($15.00)."

3847.28. "All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. All other fees and charges collected by the commission under the provisions of this act shall be by the commission paid into the state treasury and shall be by the state treasurer placed to the credit of a fund to be known as the 'public service commission fund', and the general and contingent expenses of the public service commission shall be by the state treasurer paid out of said public service commission fund upon presentation of duly verified claims therefor, which claims shall have been approved by the commission and audited by the state board of examiners."

G

That the attempt of the said Board to exact from this carrier the said Ten ($10.00) Dollar "straight" or "flat" per truck fee provided by Sec. 16 of Chapter 184, Laws of Montana, 1931 (Sec. 3847.16, Revised Codes of Montana, 1935) by its said Order No. 1746 in Docket No. 3075, of October 9, 1939, assuming to deny this carrier all right to operate in interstate commerce over Montana highways accompanied by the threats of said Board to seize and im- [fol. 29] pound the trucks of carrier and to cause the arrest of drivers of said trucks and the institution of criminal proceedings against this carrier and said drivers if said

fees were not paid, is in excess of the statutory power and authority of said Board, and in contravention of the provisions of Sec. 23, Ch. 184, Laws 1931 aforesaid (Sec. 3847.23 Revised Codes of Montana, 1935, reading as follows:

3847.23 "The terms and provisions of this act shall apply to commerce with foreign nations, and to commerce among the several states of this Union, insofar as such application may be permitted under the provisions of the Constitution of the United States, treaties made thereunder and the acts of Congress; provided that it shall not be necessary for an interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing of public convenience and necessity, except as to the transportation of passengers and/or freight between points within this state, the power to regulate such operation being specifically reserved herein; and provided further, the board is hereby authorized to exercise any additional power that may from time to time be conferred upon the state by any act of Congress and provided further, that any motor carrier operating in and about any national park, whose rates and methods of accounting are controlled by contract with the United States, shall not be subject to any regulation by the commission in conflict with such contract or in conflict with any regulation by the United States made pursuant to such contract or made pursuant to an act of Congress of the United States." in that the application of said state license tax to this carrier engaged exclusively in interstate commerce is by the commerce clause of the Constitution of the United States confined to a fair [fol. 30] and reasonable charge as compensation for the use of the highways and the cost of actually regulating and policing the traffic charged, and on the face of said Ch. 184, Laws of Montana, 1931, all of the proceeds of said tax are made available not for highway construction, betterment or improvement, or for any highway use or for any regulation and policing of the traffic, but by the terms of said act for the purpose of defraying the expenses of administration of this act and the regulation of the businesses" described in the Act; and, further, in practise the proceeds of said tax are used and expended to pay the salaries of members of plaintiff Board and its ex-officio commissions as set forth in Paragraph "B" above, the salaries of the employees on the staffs of each, and the traveling and

administrative expenses, incident to the activities of the multiple powers invested in said board and its ex-officio commissions in the regulation of railroads, public utilities, pipe lines, public mills, public boats on navigable waters, oil pipe lines, gasoline inspection, and also merchants' prices and practices under the Unfair Practice Act. That the language of said Sections 16, 17 and 23 of said Chapter 184, Laws 1935, in the presence of the constitutional restrictions of the commerce clause of the Federal Constitution, and the practical administration of said Act by said Board demonstrate that said tax is not applicable to interstate commerce, and the operations of this carrier, and the present attempt by said Board to make it so by its construction aforesaid violates the said statute and will, unless enjoined, render the same unconstitutional and void. The said tax is, by the terms of Chapter 184, Laws 1931, applicable only, if at all, to motor carriers, to the operations of motor carriers as defined in said act, which are intrastate [fol. 31] in character, and relate and cover only motor carriers licensed by said Board for the transport of freight, goods, and commodities in intra-state commerce between points wholly within the State of Montana.

II

That if the said Ten Dollar "flat" or "straight" per vehicle tax provision must, by its terms, be construed to disclose a legislative intent to make it applicable to this carrier in interstate commerce, then and in such event, this carrier alleges:

(1) That said Sections 16 and 17, Chapter 184, Laws 1931 (now Sections 3847.16 and 3847.17, Revised Codes of Montana, 1935) violate the equal protection clause of the 14th Amendment to the Constitution of the United States, and further violate Sections 1 and 11 of Article XII of the Constitution of the State of Montana, requiring license taxes to be based on a fair and just classification and prohibiting arbitrary and discriminatory classification of the subjects thereof in that the attempt to impose a "flat" or "straight" per vehicle tax on every motor vehicle operated by a motor carrier over the public highways of Montana, without regard for whether said vehicles are operated by a Class A, Class B or Class C Motor carrier, as in said act defined and established, without regard to whether said

vehicle is operated in interstate commerce, or intrastate commerce, or in commerce at all, without regard for size, capacity, or weight, without regard to the effect in wear and tear, or other depreciation of said motor vehicle on the highways, without regard to the use or purpose of said motor vehicle, whether occasional or relatively continuous, without regard to the mileage, loaded or empty, traveled or covered by said motor vehicle on the highways, without [fol. 32] regard for the necessity of policing or regulating the said motor vehicle, or the traffic in which it may be engaged, without regard for the volume or nature of the traffic and the administrative labors, if any, related and responsive thereto, results in an arbitrary blanket classification of all motor carriers which ignores the essential, factual and realistic differences and distinctions between the members of said gross class.

(2) That the provisions of Section 1 of Chapter 184, Laws 1931 (now Section 3847.1, Revised Codes of Montana, 1935) exempting from the operation of said Act and said "straight" or "flat" Ten Dollar per vehicle tax—". . . the transportation of freight * * * by motor vehicles when done occasionally and not as a regular business," or ". . . the transportation by means of motor vehicles in the regular course of business of employees, supplies and materials by any person, firm or corporation engaged exclusively in logging or mining operations, in so far as the use of employees, supplies and materials in construction and production is concerned" are construed by said Board as not affording exemption to this carrier from the provisions of said act and as so construed, violate the equal protection clause of the 14th Amendment to the Constitution of the United States, and, further, violate Sections 1 and 11 of Article XII of the Constitution of the State of Montana, in that this carrier only occasionally transports freight by motor vehicle and not as a regular business over the highways of Montana; and, further, in that the transportation of logging or mining supplies and materials in construction and production, ever recurring incidents of major industry in Montana, makes a regular, burdensome, [fol. 33] hazardous and traffic interfering use of the highways of Montana and creates demands for regulation and policing of such traffic much greater in volume, in import and effect on highways and highway traffic than this car-

rier's occasional use of Montana highways in interstate commerce, to the distinct prejudice of this carrier and others similarly situated.

That if said Ten Dollar "flat" or "straight" per vehicle license fee, as prescribed by Sec. 3847.16, R. C. M. 1935, must be construed as contended by said Board, i. e., as applicable to the operations of this carrier in interstate commerce into, out of, through and across the State of Montana, the said attempted license, fee or tax, is null and void in contravention of clause 3 of Section 8 of Article 1 of the Constitution of the United States of America, *and* in contravention of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and in contravention of Section 27 of Article III of the Constitution of the State of Montana, in that:

(1) The said tax as laid, and as asserted by and through said Board of Railroad Commissioners, or otherwise, is in fact an attempt to lay a tax on the privilege of engaging in interstate commerce, and the State of Montana is without power to tax such privilege, and, as construed, Sec. 23 of said Act exhibits that said act and tax is hostile to, and destructive of, interstate commerce.

(2) The said tax as thus laid and construed, indiscriminately covers motor carriers both in intrastate commerce and in interstate commerce, is not apportioned on any basis, is not capable of separation, bears no relationship to the use of the highways for which the charge is made, thereby failing as a whole in its attempted application to the operation of this carrier.

(3) None of the said fees or taxes attempted to be col- [fol. 34] lected by the Board of Railroad Commissioners of the State of Montana from this carrier and transmitted to the State Treasurer of the State of Montana and by him credited to the so-called "motor carrier fund" is appropriated by law, or in practise employed, for the construction, improvement or maintenance of any state highways or of any roads of the State of Montana or for policing and regulating highway traffic by motor carriers or any highway traffic or for which benefits this carrier or other similarly situated in its interstate commerce operations. That said Board is not authorized by the provisions of Chapter 184, Laws 1931, or any other law of the State of Montana, to

appoint or set up any inspectors, field men, or supervisors under and in connection with Chapter 184, laws 1931; and the attempted regulation of the business of motor carriers under the terms of said act is in no manner related to the use of the highways, or roads or any of them, of the State of Montana by motor carriers and all policing, regulating and inspecting of highway motor traffic is performed by the State Highway Department, the State Motor Vehicle Department and the State Highway Patrol, all of which departments and agencies are wholly separate from said Board of Railroad Commissioners, and no fees, taxes or revenues of the Board are or may be used by said departments or agencies. That, notwithstanding any recitals in said provisions for said Ten Dollar per motor vehicle tax covering compensation for use of the highways, the Legislative Assembly of the State of Montana has by law (House Bill No. 410, Laws 1939, approved March 17, 1939, appropriated all monies of the motor carrier fund for "carrying out all the duties of the Railroad and Public Service Commission (Montana Session Laws 1939, pp. 662 and 665.)

(4) That the total of said Ten Dollars ($10.00) per [fol. 35] truck fees demanded of this carrier, is excessive and more than is reasonably necessary or proper to defray the permissible regulation and policing of this carrier's operations in Montana, or the expenses of the administration of the Act as respects this carrier's Montana operations if the same had any fair relationship to the use of the highways and this carrier asserts that no such relationship exists.

(5) That a reasonable charge to this carrier for the purpose of defraying the expenses of policing and regulating the business here involved by the Board of Railroad Commissioners is less than the amount demanded under said Ten Dollar per vehicle provision in that the presence of interstate motor carriers like Aero Mayflower on the highways of Montana occasions no hearings for certificates and a minimum of routine office recording, not exceeding for all such carriers the time of one man at $125.00 per month for one month in each year.

(6) That the fees demanded for each of the years in question are in each instance more than the privilege is

worth. That in its essential nature the business of this carrier is occasional and intermittent, notwithstanding it makes as full use of the Montana highways as it can, all factors considered. It would be impossible and impracticable for carrier to allocate one or more pieces of its equipment to operate within the State of Montana only, as such an allocation would involve the transfer of loads at the State line both at the time the load was received by the truck allocated to Montana operations and at the time when the load was delivered to another truck to continue the journey. The expense of loading and unloading, and the delays involved would place an undue burden upon this carrier and its interstate commerce both as to expense and [fol. 36] time, and would also involve a vast increase in empty and unprofitable miles traveled by trucks within the State of Montana, rendering it impossible for this carrier to conduct its operations, and this carrier would be thereby and thus prevented from engaging or carrying on its business in any manner whatsoever over the highways of Montana, and this carrier alleges that the demands made upon it by the Board as hereinabove set forth in the aggregate, or separately considered,—unjust, unreasonable and unfair and are in violation of Section 1 of the 14th Amendment of the Constitution of the United States of America, and hostile to and destructive of interstate commerce over Montana highways, in violation of the commerce clause of the Constitution of the United States.

(7) That the fees attempted to be collected by defendant Board of Railroad Commissioners from this carrier under said Section 16 of Chapter 184 aforesaid, for each of said years, are in and of themselves excessive, exorbitant, unreasonable in amount, and constitute an undue and unjust burden on the interstate commerce transacted by this carrier; and further that said demanded fees, taken in connection with the fees already paid to the State of Montana for the registration of and license plates for its several vehicles during the periods in question, and by gasoline excise for highway debentures, constitute and are an unjust burden on the interstate commerce transacted by this carrier, in that they bear no reasonable relation to the privilege of user and are excessive for the declared purpose of administration.

That the said Board of Railroad Commissioners has under its intrastate jurisdiction in excess of fifty Class "A" operators, and in excess of fifty Class "B" operators [fol. 37] and in excess of four hundred and sixty Class "C" operators, carrying either freight and express or passengers and baggage or passengers and light freight and express, and the receipts from the collection of said Ten Dollar per vehicle license fee on said intrastate operators averaged, for the years 1937, 1938 and first ten months of 1939, $12,500.00 per year and in each of the years 1937 and 1938, the said Board has carried over from said "motor carrier fund" to the succeeding fiscal year, an average unexpended balance of $40,000.00 made up in part of said Ten Dollar license fees and partly of other moneys collected by defendant as gross operating revenue taxes under the provisions of Sections 3857.27 and 3847.28, R. C. M 1935, hereinafter referred to.

I

That the attempt of the Board of Railroad Commissioners of the State of Montana to exact from said carrier the Ten ($10.00) Dollars per vehicle fee fixed by Secs. 16 and 17 of Chapter 184, Laws 1931, (Secs. 3847.16 and 3847.17, Revised Codes of Montana, 1935) by its said order No. 1746 in Docket No. 3075, of October 9, 1939, denying this carrier all right to operate in interstate commerce over Montana highways is unconstitutional, null and void in that said action violates the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and the due process of law clause in Sec. 27 of Article III of the Constitution of the State of Montana in this particular:

The said Board and the individual members thereof wholly failed to make any findings of fact consequent on the proceedings in said Docket No. 3075 and proceeded to an order therein without making or serving upon this carrier at any time any proposed findings of fact or con- [fol. 38.] clusions of law upon the record in said docket, and further said Board and members wholly ignored the uncontradicted, credible evidence of record before it, all of the evidence at said hearing being submitted by this carrier, fully establishing this carrier's right to operate in interstate commerce over Montana highways, free from any obligation to pay said fees.

J

That the further and additional attempt of said Board of Railroad Commissioners of the State of Montana, ex-officio the Public Service Commission of Montana, to collect and exact from this carrier, for and on account of its operations in interstate commerce as aforesaid, a fee of one-half of one per cent (½ of 1%) of the gross operating revenue of this carrier from all its business in the United States of America, subject to a stated annual minimum of $15.00 for each vehicle registered and/or operated under the said Motor Carrier Act, Section 2, Ch. 100, Laws of Montana, 1935 (Sec. 3847.27 R. C. M. 1935) and the order of said Board No. 1746 in Docket No. 3075 in aid of said attempt is wholly unlawful, null and void, and beyond the statutory authority of said board, in that:

(a) The Public Service Commission of Montana is a statutory creature of the Legislative Assembly of the State of Montana possessing only the powers expressly granted or implied by law, and said commission has no jurisdiction, power or authority over motor carriers and by Sec. 3880, R. C. M. 1935, is excluded from any authority over motor carriers, and is without jurisdiction to grant certificates of convenience and necessity to motor carriers in any event.

(b) The said tax or fee, if applicable to the operations [fol. 39] of any motor carrier, is confined and is intended to be confined to the business of motor carriers operating only in intrastate commerce between points wholly within the State of Montana and, as such, is in no respect applicable to the strictly interstate operations of this carier.

(c) This carrier is not a "motor carrier holding a certificate of public convenience and necessity issued by the Public Service Commission," and by the provisions of Sec. 23 of Ch. 184, Laws 1931, (Section 3847.23 Revised Codes of Montana, 19[illegible] is exempted from any duty to obtain such a certificate from the parent Board of Railroad Commissioners and said act is wholly inapplicable to this carrier.

K

That if the so-called gross operating revenue tax with annual minimum prescribed by Secs. 2 and 3 of said Chapter 100, Laws of Montana, 1935 (now Sections 3847.27 and

3847.28 Revised Codes of Montana, 1935) is by its terms to be construed as applicable to the operations of this carrier in interstate commerce, and such statute is so construed by said Board of Railroad Commissioners, then the said Sections 3847.27 and 3847.28 Revised Codes of Montana, 1935, are, and each of them is, unconstitutional, null and void in that they violate Clause 3, Section 8, Article I of the Constitution of the United States of America and, in addition, the due process of law clause of the Fourteenth Amendment to the Constitution of the United States of America and, further, the due process of law clause of Section 27 of Article III of the Constitution of the State of Montana.

(1) Because such statutes attempt to burden motor carriers with part of the cost of the regulation of public [fol. 40] utilities within the State of Montana through the Public Service Commission of the State of Montana, which Commission, by the provisions of Sections 3879-3913, Revised Codes of Montana, 1935, is charged with the regulation of public utilities in the State of Montana, i. e., utilities privately owned or publically owned, distributing heat, street railway service, light, power in any form or by any agency, water for business, manufacture, household use or sewerage service, telegraph or telephone service to the general public, and none of the activities of the said Public Service Commission of the State of Montana is in any manner or respect related, directly or indirectly, to the regulation of the business of motor carriers over the highways of the State of Montana, or to the construction, maintenance, betterment and improvement of any roads or highways in Montana, or to the policing of the same or the traffic thereon, or to any regulation of motor carriers, and none of its activities is of any benefit or advantage to interstate motor carriers or has any relation to them or their use of the highways of Montana.

(a) This carrier has no operating revenues except those derived from interstate commerce. The state of Montana is without power, right or authority to impose said gross revenue tax upon the interstate business of this carrier for the declared purpose of he tax, for its real purpose, or for any purpose.

(b) The State of Montana is without right, power or authority to apply, exact or collect a highway privilege tax

indiscriminately applied to the aggregate gross revenues from both intrastate business and interstate business of motor carriers without regard for the substantial distinctions between the two types of businesses with respect to their use of the highways of Montana, and relation to the [fol. 41] declared purpose of regulation or real purpose of said taxation, and without apportionment, or basis of apportionment, so as clearly to exclude from its operation and effect the right of this carrier to engage exclusively in intrastate commerce over the highways of Montana on conditions permitted to the State, assuming that a gross revenue tax could under any circumstances bear any relation to compensation for highway use or proper state regulation.

(c) No part of the fees under said Sections are in truth or in practice, or by controlling legislative direction, exacted as compensation for the use of any of the highways of Montana by this carrier or for cost of policing the traffic of this carrier; such fees bear no relation whatsoever to the use of said highways, no part of them is to be used or is usable for the construction, improvement, repair or maintenance of any of the highways of Montana, or reasonably allocated for the regulation and policing of interstate traffic thereon, but on the other hand, by the express terms of said Act, all of said fees are paid into the State Treasury, to the credit of the Motor Carrier Fund, referred to in said Section 17, of Chapter 184 of the Laws of 1931; and by the legislative assembly of the State of Montana appropriated for "carrying out all the duties of the railroad and public service commission." (Montana Session Laws 1939, pp. 662 and 665.)

(4) The fee provided by said Sections purports to be equal to one-half of one percent of the amount of gross operating revenue of this carrier with the proviso that with respect to each Class "C" carrier, and said Board asserts such to be the classification of this carrier, a minimum annual fee shall be $15.00 per each vehicle registered and/or operated under the Motor Carrier Act; such provision [fol. 42] wholly fails to make any distinction between gross receipts in interstate and those in intrastate commerce, and all of carriers gross operating revenues are from interstate commerce and hence the minimum of $15.00 per truck is a direct burden on such commerce without warrant in law as aforesaid.

(3) The fees proposed to be exacted by the Board of Railroad Commissioners under this section constitute and are in fact an occupation tax, and therefore, are not applicable, assessable or collectible against this carrier who is engaged solely in interstate commerce.

(f) That said Sections 16 and 17 Chapter 184, Laws 1931 (now Sections 3847.27 and 3847.28, Revised Codes of Montana, 1935) violate the equal protection clause of the 14th Amendment to the Constitution of the United States and, further violate Sections 1 and 41 of Article XII of the Constitution of the State of Montana, requiring license or privilege taxes to be based on a fair and just classification and prohibiting arbitrary and discriminatory classification of the subjects thereof, in that the attempt to impose a gross revenue tax together with a "flat" or "straight" per vehicle minimum tax on every motor vehicle operated by a motor carrier over the public highways of Montana, without regard for whether the gross revenues derive solely from interstate or from intrastate commerce, or both, without regard for whether said vehicles are operated by a Class A, Class B or Class C Motor carrier, as in said act defined and established, without regard for size, capacity or weight, without regard to the effect in wear and tear, or other depreciation of said motor vehicle on the highways, without regard to the use or purpose of said motor vehicle, whether occasional or relatively continuous, without regard to the [fol. 43] mileage, loaded or empty, traveled or covered by said motor vehicle on the highways, without regard for the necessity of policing or regulating the said motor vehicle, or the traffic in which it may be engaged, without regard for the volume or nature of the traffic and the administrative labors, if any, related and responsible thereto, results in an arbitrary blanket classification of all motor carriers which ignores the essential, factual and realistic differences and distinctions between the members of said gross class and wholly and indiscriminately ignores, in particular, the permitted bases of state burdens on interstate motor vehicles and their interstate traffic.

L

This carrier alleges that both of said acts assuming to prescribe respectively (a) the Ten Dollar per vehicle "flat" or "straight" fee and (b) the 1 and ½% Gross Operating

Revenue fee with a "flat" or "straight" per vehicle minimum purport to declare that said exactions are levied "in consideration of the use of the highways in the state." That said declarations are of no force or effect, and gratuitous in character in that the further, express terms of both of said acts show upon the face thereof, that said exactions are for the purpose of securing revenues to carry on the whole motor vehicle administration of said Board in all phases and incidents. That, in addition, the Legislative Assembly of Montana has expressly appropriated all of the receipts from said exactions for "carrying out all the duties of the railroad and public service commission" in the multiple fields of administrative activity authorized by the Legislative Assembly, viz., in brief statement, regulation of railroads, steam and electric, express companies, sleeping car companies, freight line companies, all public utilities of every nature, in Montana, private or municipal, [fol. 44] flour mills, grain elevators, boats and pilots on navigable waters, oil pipe lines, producers, refiners and distributors of gasoline, fuel oil, lubricating oil, etc., merchants and sellers of commodities under the Unfair Practices Act, etc., etc.

That the roads and highways, and facilities thereof, furnished to the public by the State of Montana are, as to the State Highway System (commonly known as the "Federal Aid Highway System") used by this carrier constructed by the United States of America and the State of Montana, the United States bearing 55% of the cost of construction and the State bearing 45% of the cost of construction. That with respect to the maintenance of the State Highway System, and the construction and maintenance of all other roads and highways in Montana, the cost thereof is provided by the State of Montana. That in all cases the funds provided by the State of Montana are derived entirely from the Motor License and Registration Tax and the Gasoline license tax referred to in Paragraph "E" above and this carrier pays and discharges all of said license tax exactions for which it is liable and notwithstanding its occasional and intermittent use of the State Highway System (and no other States Roads or highways) as aforesaid.

M

This carrier alleges that it is not operating into, out of, through or across the State of Montana on the highways thereof in violation of Chapter 184, Laws 1931, but that it is operating, strictly in interstate commerce only, into, out of, through or across the State of Montana, under and pursuant to the provisions of the Federal Motor Carrier Act of 1935, in accordance with Permit No. 2934 issued by the Interstate Commerce Commission of the United States of America to [fol. 45] this carrier and the State of Montana is without authority to compel this carrier to apply for, receive or obtain from it a certificate of public convenience and necessity authorizing such operation, or to prohibit or interfere with this carrier in the conduct and carrying on of its interstate business over and upon the public highways of the State of Montana as its vehicles proceed into, out of, through or across said state, the Interstate Commerce Commission having exclusive authority in the premises under said Federal Motor Carrier Act of 1935.

Wherefore, this defendant and cross-complainant prays that said Report and Order No. 3075 of the plaintiff Board, dated October 9, 1939, be declared null and void, and as such be by the court vacated and set aside.

That Sections 3847.16, 3847.17, 3847.27 and 3847.28, R.C.M. 1935, if found applicable in terms to the interstate operations of this carrier into, across, through, or out of the State of Montana, be held and declared to be in violation of the commerce clause of the Constitution of the United States, and/or of the due process clause and/or of the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States of America, and in violation of Sec. 27 of Article III of the Constitution of the State of Montana, as applied to the Interstate business of this carrier.

That said Board be permanently enjoined and restrained from enforcing or attempting to enforce any provision of its said Report and Order No. 3075 and of said statutes, or any of them, against this carrier and that said Board be permanently enjoined and restrained from interfering with, obstructing or in any manner prohibiting this carrier from using the highways of the State of Montana in interstate [fol. 46] commerce, for or on account of any matter or thing

in said Report and Order No. 3075 and said statutes contained.

E. G. Toomey, John W. Chapman, Toomey, McFarland & Chapman, Attorneys for Defendant and Cross-Complainant.

Emmett S. Huggins, of Counsel.

Duly sworn to by E. G. Toomey. Jurat omitted in printing.

[fol. 47] EXHIBIT "A" TO ANSWER OF DEFENDANT

Before the Board of Railroad Commissioners of the State of Montana.

In the Matter of Fees Owed by the Aero Mayflower Transit Company, a motor carrier.

Docket No. 3075

To Aero Mayflower Transit Company, Indianapolis, Indiana:

Whereas this Board who is charged with the administration of the Motor Carrier Act of this State has upon due investigation found that you, Aero Mayflower Transit Company of Indianapolis, Indiana, have been operating as a motor carrier for hire over the public highways of the State of Montana and are now operating as such motor carrier for hire over the public highways of the State of Montana relating to motor carriers by refusing to pay the fees required by the laws of the State of Montana as required of motor carriers under the laws of the State of Montana, and are now operating as a motor carrier for hire over the public highways of the State of Montana without complying with the laws of the State of Montana relating to motor carriers by refusing to pay said fees though various demands have been made by this Board upon you, Aero Mayflower Transit Company, to pay the fees owed by you to the State of Montana according to the laws of the State of Montana for your operations as a motor carrier over the public highways of the State of Montana and you, Aero Mayflower Transit Company, have refused and now refuse

to conform to said demands in making payment of said fees to the state of Montana.

Now, therefore, this Board being fully advised in the premises does hereby order you, Aero Mayflower Transit Company of Indianapolis, Indiana, to appear before this Board at its offices in the Capitol Building, Helena, Montana, on October 6, 1939, at 10:00 A. M. of said day and show [fol. 48] cause if any you have why any right or rights, permit or permits granted you by this Board to operate as a motor carrier over the public highways of the State of Montana should not be revoked and cancelled by this Board because of your non-compliance with the laws of the State of Montana relating to motor carriers as heretofore set forth as stated.

Done by order of the Board of Railroad Commissioners of the State of Montana this 19th day of September, 1939.

Paul T. Smith, Commissioner, Horace F. Casey, Commissioner, Austin B. Middleton, Chairman.

Attest: Official.

John W. Bonner, Secretary and Counsel. (Seal)

EXHIBIT "B" TO ANSWER OF DEFENDANT

THE STATE OF MONTANA

Before the Board of Railroad Commissioners of the State of Montana.

In the Matter of Fees Claimed from Aero Mayflower Transit Company.

Docket #3075

RETURN TO ORDER TO SHOW CAUSE

In answer and return to the order issued by this Board under day of September 19, 1939, directing the Aero Mayflower Transit Company to appear before it on October 6, 1939 to show cause, if any, why any right or rights, permit or permits, granted it by this Board to operate as a motor carrier over the public highways of the State of Montana

should not be revoked and cancelled, said Aero Mayflower Transit Company respectfully submits:

1. That Aero Mayflower Transit Company is, and has been at all times involved herein, a corporation with its principal office in the City of Indianapolis, State of Indiana, [fol. 49] operating a fleet of motor trucks engaged solely in the transportation by motor truck of used household goods and office fixtures throughout the several states of the United States; that it is now and has been at all times since the effective date of the Federal Motor Carrier Act operating throughout the United States in such capacity under and pursuant to a permit granted by Interstate Commerce Commission and under and pursuant to the grandfather clause of said Federal Motor Carrier Act; that such operations of this respondent as affect the State of Montana are wholly interstate in character; that this company is not now doing and has not at any time done any intrastate business within the State of Montana. In 1935 this respondent was granted a Type "C" Permit by the Board of Railroad Commissioners of the State of Montana.

2. That all trucks of this corporation circulate throughout the United States as the business demands; that no trucks are allocated to any particular State or section of the United States; a shipment of household goods and used office furniture is incident to the change of residence of the owner, is somewhat seasonal in its nature, and in view of the general character of the business, the operations of this company cannot be operated and are not being operated on any regular schedule or over any regular route. That all of the trucks are licensed in and bear the license plates of the State of Montana; that the State of Indiana has now and has had for several years in effect a statute creating a "reciprocity Commission", which commission is authorized to enter into a reciprocal contract and agreement with any like commission or properly authorized body in any other state in the United States as may be deemed proper, expedient, fair and equitable to citizens of each state involved, [fol. 50] with a view to promoting and establishing such fair, just, equitable and reciprocal agreements for the licensing, movement, taxing, registration, regulation and fees to be charged by each state against motor vehicles of the other states to any such agreement; that such Reciprocity Com-

mission of the State of Indiana is and has been at all times ready and willing to enter into an agreement with the State of Montana whereby these properly licensed trucks of each state shall be exempt from the payment in the other states to such agreement of license fees, taxes, Public Service Commission fees and all other such fees; this respondent believes that such a reciprocity agreement between the State of Montana and the State of Indiana should be entered into, by the terms of which motor vehicles, properly licensed under the State of Montana, operating in the State of Indiana, would be exempt from fees of the character now claimed by the State of Montana against this respondent and this respondent would be exempt from the payment of the fees now demanded by the State of Montana.

3. That under and pursuant to the provisions of the Federal Motor Carrier Act approved by the President on August 9, 1935, Congress gave to Interstate Commerce Commission the exclusive authority to pass upon the application of a motor carrier engaged exclusively in interstate commerce on the highways for a Certificate of Public Convenience and Necessity, and such act of Congress superceded state legislation.

Southwestern Greyhound Lines vs. Railroad Commission, 99 SW 2nd 263.

Northern Pac. Oil Co. vs. State of Washington, 22 S. U. S. 370.

Erie Oil Co. vs. People of State of New York, 233 U. S. 671.

[fol. 51] This respondent understands and believes that the fees now demanded by your Honorable Board are those specified in Section 3847.16 Revised Codes of Montana, 1935, providing for the payment to your Board of the sum of Ten Dollars per annum for every motor vehicle operated by the carrier over or upon the public highways of Montana, and Section 3847.27 Revised Codes of Montana, 1935, providing that in addition to all other licenses, fees and taxes imposed upon motor vehicles in your State, every motor carrier holding a Certificate of Public Convenience and Necessity shall between the 1st and 15th days of January, April, July and October of each year, file with the Public Service Commission, a statement showing the gross operating revenue of such carrier for the preceding three months

of operation and shall pay to the Board a fee of one-half of one percent of the amount of such gross operating revenue, provided, however, that the minimum annual fee which shall be paid by each Class "C" carrier for each vehicle registered and/or operated under the motor carrier act shall be Fifteen Dollars. Under both such blanket sections of the Montana statutes all fees collected from motor carriers are paid into the State Treasury and placed to the credit of the "Motor Carrier Fund". The first cited section provides that such funds shall be available for the purpose of defraying the expenses of administration of the act and the regulation of the business and shall be accumulative from year to year. There is no provision that any part of the funds shall be *sued* for maintenance and improvement of the roads nor is it apparently contemplated that it will all be used in defraying the expenses of administration. Both sections of the statute quoted, or referred to, purport to require fees to be paid in considera-
[fol. 52] tion of the use of the highways. This, however, is not determinative of their validity. Charges imposed on the theory of compensation for use of the roads must either bear a reasonable relation to the actual use of the roads or be used for highway purposes; neither of the above sections of the statute limits the cost of administering regulations, the fees are not levied for highway purposes and are in no way based upon actual use of the highways. The specific provision in the first cited statute that the fund is to be available for the purpose of defraying the expenses of administration of the act and the regulation of the business negatives any intention to use these monies for highway purposes and would preclude this Board from making any contention that it is to be used; if excessive for the purpose of paying such expenses it is necessarily invalid. In support of the invalidity of this Ten Dollar per truck charge the respondent relies upon:

Strout vs. South Bend, 277 U. S. 163 and cases cited;
Ingels vs. Mors. 300 U. S. 290;
Interstate Transit, Inc. vs. Lindsey, 283 U. S. 183.

In no case decided by the Supreme Court of the United States has such a tax been upheld as compensation for use of the highways unless it was either apportioned to actual use or actually devoted to highway purposes.

The fees sought to be collected under the provisions of Section 3847.27 of the Montana Code of 1935 are based solely on the amount of operating gross revenue; the respondent has no operating revenue other than that derived from interstate commerce; consequently any tax imposed on its gross revenue whether on the basis of a percentage or a fixed minimum is necessarily a tax imposed on revenue derived from interstate commerce; the State of Montana [fol. 53] has no power to impose a tax based upon receipts derived from Interstate commerce.

J. D. Adams Mfg. Co. vs. Storen, 304 U. S. 307.

The proposed tax on gross operating revenue is in an arbitrary minimum; it is not based on any actual revenue a fair interpretation of the language in this section leads to the conclusion that these fees sought to be collected relate only to intrastate business, none of which is done by this respondent in the State of Montana. A charge cannot be exacted by the state for the privilege of engaging in interstate commerce.

Sprout vs. South Bend, supra;
Interstate Transit vs. Lindsey, supra;
Ingels vs. Mors, supra.

In the case of Gwin, White and Prince vs. Henneford (Jan. 3, 1939) 83 L. Ed. 276, a tax on the gross income of all persons engaging within the State in any business activity was held invalid as applied to income derived from interstate commerce. The Court said:

> "Here the tax measured by the entire volume of the Interstate Commerce in which appellant participates is not apportioned to its activities within the state. A portion of this fee to exact such a tax other states to which the commerce extends may with equal right lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. Thus such a multiplication of state taxes each measured by the volume of the commerce would reestablish barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden [fol. 54] depends upon its nature measured in terms of its capacity to obstruct interstate commerce and

not on the contingency that some other state may first have subjected the commerce to a light burden."

In addition to the fees sought from respondent for each truck operated into, out of or through the State of Montana, your Honorable Board should give consideration also to the fees attempted to be exacted under Section 1760.7 of the Montana Statutes by which it is required that before any foreign licensed motor vehicle shall be operated on the highways of Montana for compensation or profit, or be used by the owner thereof while engaged in gainful occupation or business enterprise in the State of Montana, the same shall be registered and licensed in the same manner as domestic owned vehicles. Under and pursuant to the provisions of such section the Motor Vehicle Department of the State of Montana is demanding that each vehicle of the respondent which enters the state be licensed under the laws of Montana. The language in this section is believed by the respondent herein to relate only to foreign owned motor vehicles doing intrastate business in that the language refers to "gainful occupation or business enterprise *in the state* of Montana;" "In the state of Montana" is identical in its meaning as "within the state of Montana". Irrespective of whether such license fees relate to wholly interstate operations or those of a foreign vehicle owner operating wholly within the state of Montana the fact remains that under this statute in question the charge made is in no way measured by actual use of the highways nor does it on its own face purport to be exacted as a consideration for the use of the highways. It is unrelated to the public safety. There is no provision that it be used [fol. 55] for the maintenance of State and Federal highways which are used by the respondent almost entirely. The respondent's use of city streets and county roads to which these fees are applicable is inconsequential. In this respect there is a vast difference between the rights of the state with reference to intrastate commerce, where the taxing power may be involved and interstate commerce where it cannot be. This was plainly recognized by the Supreme Court of the United States in Carley and Hamilton vs. Snook, 281 U. S. 66.

4. The respondent admits that during the year 1937, twenty-five different pieces of its equipment came into,

out of or went through the State of Montana; it understands your commission is claiming twenty-six different pieces of equipment, but it appears that #3867 is listed twice on the Bill of Particulars furnished by your commission and it should be listed but once; the total miles traveled into or through Montana in the year 1937 was 37,265; of such total of twenty-five pieces of equipment, six pieces of such equipment made only one trip each into, out of or through the State of Montana, ten different pieces of equipment made two trips each, one made three trips, three made four trips, two made five trips and three made eight trips, during the year 1937; the total number of days or parts of days during the year 1937 that all such equipment made any use of the highways of Montana was 227 days, or an average use per day of the Montana highways throughout the year 1937 by any single piece of equipment of this respondent being 8 days;

In the year 1938 there were forty different pieces of equipment of this respondent which went into, came out of, or went through the State of Montana, although by duplication it is believed your records show forty-one such pieces of equipment; the total miles traveled insofar as Montana [fol. 56] is concerned during 1938 was 62,986; the total number of days all such equipment were using the highways of Montana was 385 or an average of less than 9 days per year per piece of equipment; of the forty pieces of equipment using the Montana highways in 1938, ten made one trip each, ten made two trips each, eight made three trips each, five made four trips each, one made five trips, one made six trips, one made seven trips, three made eight trips each, and one made fifteen trips, into, out of, or through the State of Montana.

For the first eight months of the year 1939, ending August 31, 1939, thirty-two different pieces of equipment belonging to this respondent made a trip into, out of or across the State of Montana; the total miles traveled during that period were 49,165, the total days all pieces of equipment, insofar as Montana is concerned, were 307; eleven such pieces of equipment made one trip each, six made two trips each, four made three trips each, seven made four trips each, one made five trips, two made six trips each and one made seven trips.

That in view of the above and foregoing facts it clearly appears that the demanded fee of Ten Dollars per truck

and the $15.00 minimum predicated on gross revenues per truck, which fees apply alike under the statute to daily users of the Montana highways as well as occasional users, are highly excessive and burdensome on this respondent especially when it is borne in mind that its operations insofar as the State of Montana is concerned are highly interstate.

5. That if the fees demanded by your Honorable Board for the year 1937 approximating $600.00 be paid, the same in addition to the $613.25 paid to the State of Montana for license plates and permits for its several pieces of equip-
[fol. 57] ment, the total of all such sums will approximate three cents per traveled mile into, out of or through the State of Montana for said year. That if the demanded fees of approximately $990.00 now be paid to your Board for the respondent's operations in 1938, the same, together with the sum of $1077.25 paid in 1938 to the State of Montana for license plates and fees on its equipment will approximate a total of $2050.00 or slightly more than three cents per traveled mile in Montana; that this respondent during the year 1939 has paid to the State of Montana for license plates and permits on its several pieces of equipment the sum of $1472.50; that that sum together with the fees demanded of the Honorable Board on the same pieces of equipment will mean a total sum which will average better than three cents per mile traveled into, out of or through the State of Montana. That such a cost of three cents or more per traveled mile in Montana or any other state is an excessive cost and constitutes a burden on interstate commerce, especially when it is borne in mind that a substantial part of such fees so paid is not collected for the use or maintenance of highways and the remainder is not used on main highways but only on city streets and minor county roads. In addition to fees already paid and those demanded it must be borne in mind that this respondent buys many gallons of gasoline in the State of Montana during its operations throughout the year.

The respondent's motor vehicles cover on the average per year more than fifty thousand miles each, throughout the United States. The respondent respectfully submits that it wants to abide by all of the reasonable laws, rules and regulations of each State in the Union and that it has not sought at any time to evade or avoid the payment of

any reasonable legal fees demanded by the State of Mon-
[fol. 58] tana; it respectfully submits and reiterates that the fees demanded by your Honorable Board are not legal and valid; considering the nature and extent and character of the operations of this respondent into, out of and through the State of Montana. This respondent submits that in the absence of any statute valid as to its operations, no tax is due from it for its operations into, out of or through the State of Montana; it agrees that in equity it should pay something to the State of Montana for the use it makes of the Montana highways. It believes that a fair charge for the use of the highways of Montana by it would approximate one cent per traveled mile. This respondent has heretofore offered to try to compromise this matter and it is now willing to try to compromise the matter. It believes that a fair compromise payment to the State of Montana would be the purchase by it of a limited number of truck license plates of Montana for the year, under which any and all pieces of equipment would have the use of the Montana highways in its interstate operations only. It believes that it has already paid the State of Montana more than a fair and equitable charge for the use it has made of the Montana highways during the years 1937, 1938 and 1939 and it therefore respectfully submits there is no justification for the demand for additional fees of your Honorable Commission.

This respondent further respectfully submits that if your Honorable Commission, upon further consideration of this whole matter, still believes that the fees it has demanded for the years in 1937 and 1938 and for the year 1939 are due from this respondent, your Commission should not cancel the permit or permits heretofore granted such respondent but that on the other hand the whole matter should be held in abeyance until a suit can be instituted
[fol. 59] by this respondent to determine its rights in the premises; and this respondent now offers to post with your commission a bond in a sum sufficient to cover the fees demanded, executed by some reliable surety company, and agrees to institute within a reasonable time hereafter an action against your Commission and other officers of the State of Montana in a proper court of record, either as a declaratory judgment action or otherwise, in which the questions involved herein will be litigated; the respondent wants to state further however that it is not seeking litiga-

tion in this matter; it is seeking a fair interpretation of the laws of Montana with respect to the Federal Motor Carriers Act and with respect to the Commerce Clause of the United States Constitution and it is willing to be fair in its attitude toward the State of Montana.

STATE OF INDIANA,
County of Marion, ss:

Emmett S. Huggins, being duly sworn upon his oath says that he is and has been at all times mentioned in the above and foregoing return to order to show cause, the duly elected, qualified and acting Secretary of Aero Mayflower Transit Company, the respondent in the above and foregoing; that he has examined the books and records of the respondent and now says that the matters and things therein stated are true to the best of his knowledge and belief as shown by said records and books.

Emmett S. Huggins.

Subscribed and sworn to before the undersigned Notary Public in and for said County and State, this 29th day of September, 1939. My Notarial Commission will expire 6-24-1942. John L. Hunn, Notary Public. (Notarial Seal.)

[fol. 60] EXHIBIT "C" TO ANSWER OF DEFENDANT

Before the Board of Railroad Commissioners of the State of Montana

Docket No. 3075. Order No. 1746

In the Matter of Fees Owed by the AERO MAYFLOWER TRANSIT COMPANY, a Motor Carrier

APPEARANCES:

E. G. Toomey, Attorney, Helena, Montana, for Aero Mayflower Transit Company.
John W. Bonner, Counsel, for the Board.

It appearing to this Board that the Aero Mayflower Transit Company of Indianapolis, Indiana, having made its return on October 6, 1939 at 10 o'clock A. M. of said day before this Board in its offices in the Capitol Building,

Helena, Montana, in response to the Order to Show Cause heretofore issued by this Board in this Docket to the Aero Mayflower Transit Company why any right or rights, permit or permits granted by this Board to said Aero Mayflower Transit Company to operate as a motor carrier under the laws of the State of Montana should not be cancelled for the nonpayment of fees owed by said Aero Mayflower Transit Company to the State of Montana under the laws of the State of Montana and rules and regulations of this Board.

And it further appearing to this Board that no good and legal reason exists why said fees should not be paid the State of Montana under the laws of the State of Montana by the Aero Mayflower Transit Company because of its operations as a motor carrier over the public highways of the State of Montana, and this Board after due consideration and deliberation and after being fully advised in the premises;

Does Hereby cancel, revoke and extinguish Permit No. 1354, heretofore issued by this Board on October 3, 1935 to Aero Mayflower Transit Company authorizing it to [fol. 61] transport property over the public highways of the State of Montana as a motor carrier because of said Aero Mayflower Transit Company refusing to pay to the State of Montana fees owed by it under the laws of the State of Montana and the rules and regulations of this Board because of its operations as a motor carrier over the public highways of the State of Montana.

Done in open session, at Helena, Montana, this ninth day of October, 1939.

Paul T. Smith, Commissioner. Horace F. Casey, Commissioner. Austin B. Middleton, Chairman.

Attest: Official. John W. Bonner. Secretary and Counsel. (Seal.) (Filed Mar. 11, 1940.)

IN THE DISTRICT COURT, SILVER BOW COUNTY

DEMURRER—Filed March 25, 1940

Come now the plaintiffs and cross-defendants, Board of Railroad Commissioners of the State of Montana, Paul T. Smith, Horace F. Casey and Austin B. Middleton, as members of and constituting the Board of Railroad Commissioners of the State of Montana, and each of them, and demurs to the so-called further and affirmative defense and cross-complaint contained in the answer herein upon the following grounds:

I

That the defense consisting of new matter contained in the further affirmative defense and cross-complaint in the answer is insufficient in law upon the face thereof.

II

That the counter-claim contained in the further and affirmative defense and cross-complaint in the answer is [fol. 62] insufficient in law upon the face thereof.

III

That the counter-claim contained in the further and affirmative defense and cross-complaint in the answer is not of the character specified in Section 9138 of the Revised Codes of the State of Montana, 1935.

IV

That the defendant and cross-complainant has not legal capacity to recover upon the counter-claim contained in its further and affirmative defense and cross-complaint in the answer in that defendant and cross-complainant is without right in law to set aside the discretionary power of plaintiffs and cross-defendants but if so must institute a separate and distinct action for so doing.

Plaintiffs and Cross-Defendants, Board of Railroad Commissioners of the State of Montana, Paul T. Smith, Horace F. Casey and Austin B. Middleton, as Members of and Constituting the Board of Railroad Commissioners of the State of Montana, and Each of Them, Demurs to the Answer of

Defendant and Cross-Complainant on File Herein Upon the Following Grounds:

I

That the answer does not state facts sufficient to constitute a defense or counter-claim.

Done and dated this 23rd day of March, 1940.

Harrison J. Freebourn, Attorney General of the State of Montana. John W. Bonner, Counsel for Board of Railroad Commissioners of the State of Montana.

Service of the foregoing demurrer admitted and a true copy of the same received this 22nd day of March, 1940.

[fol. 63] Toomey, McFarland & Chapman, Wilbur H. Wood, Attorneys for Defendants and Cross-Complainant.

IN THE DISTRICT COURT, SILVER BOW COUNTY

ORDER OVERRULING DEMURRER OF PLAINTIFFS TO THE FURTHER AND AFFIRMATIVE DEFENSE AND CROSS-COMPLAINT CONTAINED IN THE ANSWER OF DEFENDANT—Filed November 19, 1942

The demurrer of plaintiffs to the further and affirmative defense and cross-complaint contained in the answer of defendant herein heretofore came regularly on for hearing before the court, said plaintiffs being represented by counsel, Enor K. Matson, Esq., and said defendant being represented by counsel, E. G. Toomey, Esq. Thereupon, the matter was submitted for consideration and decision on briefs to be handed in by said counsel and was by the court taken under advisement.

The court being now fully advised in the premises as to the law, it is ordered that said demurrer be and the same is overruled and said plaintiffs are given thirty days to reply to said further and affirmative defense and cross-complaint. The said plaintiffs are granted an exception to the ruling of the court and thirty days to prepare, serve and file a bill of exceptions.

The court believes it accords with safer and better procedure to let the said affirmative defense and cross-complaint

stand, particularly so as it claimed therein in effect that a federal question is involved in the controversy.

Done in open court this 19th day of November, 1942.

[fol. 64] Jeremiah J. Lynch, Judge.

IN THE DISTRICT COURT, SILVER BOW COUNTY

REPLY AND ANSWER—Filed February 19, 1943

Come now the plaintiffs and cross-defendants in the above entitled action and for their reply to the answer of defendant and ~~cross-complainant~~ admit, deny and allege:

I

Deny each and every allegation of paragraph I of the answer.

And for their answer to the further and affirmative defense and cross-complaint, plaintiffs and cross-defendants admit, deny and allege:

I

Admit the allegations of Sections A, B and C of said further and affirmative defense and cross-complaint.

II

Allege that they do not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in Section D thereof and, therefore, deny each and every allegation, matter and thing therein contained.

III

Allege that they do not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph (1) of Section E and therefore, deny each and every allegation, matter and thing therein, except admit that any money paid by the defendant and cross-complainant as therein alleged, if any, was paid, ap-

[fol. 65] propriated and allocated as in said statutes provided for the construction, repair and maintenance of highways in the State of Montana.

IV

Allege that they do not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in Section E and and each paragraph thereof beginning with paragraph (2), and, therefore, deny each and every allegation, matter and thing therein, except admit the enactment of and the provisions of Chapter 95 of the Laws of Montana, 1931, and specifically deny each and every allegation, matter and thing contained in that part of the fourth paragraph thereof beginning with the words in the eighth line thereof "that such charges so collected by said department", and ending at the end of the paragraph with the words "as hereinafter is more particularly pleaded", and specifically deny each and every allegation, matter and thing contained in the sixth paragraph thereof beginning with the words "This carrier alleges that a fair and reasonable charge as compensation", and ending with the words "and the privilege of operating in interstate commerce", at the end of said paragraph.

V

Admit the allegations of Section F thereof.

VI

Deny each and every allegation, matter and thing contained in Section G thereof, except admit the use of a part of the proceeds of the said tax authorized to be collected by Section 16 of Chapter 184, Laws of Montana, 1931, (Section 3847.16, Revised Codes of Montana, 1935), as therein alleged, but allege that the language of said section and the act of which it is a part unmistakably discloses the [fol. 66] intention of the Montana Legislature, in enacting the same, to require of the defendant and cross-complainant payment of the compensation for the privilege of operating its vehicles for the transportation of property for hire over the roads and highways in the State of Montana; that the right of the State of Montana to collect such fees as provided by said statute is not dependent upon whether the State of Montana in the conduct of its fiscal affairs chooses to use a part or all of the proceeds of such fees for purposes other than the construction, improvement or maintenance of its highways and that the use to which the proceeds of such fees are put by the

State of Montana is not a matter which concerns the defendant and cross-complainant, which at all times, upon payment of the fees required to be paid by said Chapter 184, Laws 1931, has been and will be granted the privilege of operating its vehicles for the transportation of property for hire over the highways of the State of Montana.

VII

Deny each and every allegation, matter and thing contained in Section H and each of the paragraphs thereof, except admit the appropriation by House Bill No. 410, Laws 1939, and admit the allegations of the last paragraph thereof beginning with the words "that the said Board of Railroad Commissioners", and ending with the words "hereinafter referred to", but allege that the language of Chapter 184, Laws 1931, including Section 16 thereof and all amendments thereto, unmistakably discloses the intention of the Montana Legislature, in enacting the same, to require of the defendant and cross-complainant payment of compensation for the privilege of operating its vehicles for the transportation of property for hire over the roads [fol. 67] and highways in the State of Montana; that the right of the State of Montana to collect such fees as provided by said statute is not dependent upon whether the State of Montana in the conduct of its fiscal affairs chooses to use a part or all of the proceeds of such fees for purposes other than the construction, improvement or maintenance of its highways and that the use to which the proceeds of such fees are put by the State of Montana is not a matter which concerns the defendant and cross-complainant, which, at all times, upon payment of the fees required to be paid by said Chapter 184, Laws 1931, has been and will be granted the privileges of operating its vehicles for the transportation of property for hire over the highways of the State of Montana.

VIII

Deny each and every allegation, matter and thing contained in Section I thereof and allege that the plaintiffs and cross-defendant either expressly or by necessary implication made all findings of fact and conclusions of law upon which they found or based their order No. 1746 in said Docket No. 3075; that the non-payment of the said

fees mentioned in Chapter 184, Laws 1931, required to be paid by defendant and cross-complainant, the subject of this controversy, was admitted by said defendant company in its "Return to Order to Show Cause" in said Docket No. 3075 as set out in Exhibit "B" attached to the answer and cross-complaint herein and made a part thereof and is admitted by the further and affirmative defense and cross-complainant; that neither in its said Return nor herein has defendant and cross-complainant claimed or asserted that it has paid such fees; that any failure, if any, by this Board to make specific findings of fact in Docket No. 3075 has been waived by the said defendant and cross-complainant and such failure, if any, [fol. 68] cannot now be made the subject of collateral attack in this proceeding.

IX

Deny each and every allegation, matter and thing contained in Section J thereof.

X

Deny each and every allegation, matter and thing contained in Section K thereof, except admit the provisions of Section 17 of Chapter 184, Laws 1931, and admit the appropriation made by the legislative assembly of the State of Montana, but allege that said Chapter 184, Laws 1931, properly and correctly construed does not require the payment of a gross revenue upon all of the interstate revenue or commerce of the defendant and cross-complainant, but requires payment only of that portion of the revenue or commerce of said company carried on within the State of Montana; that ever since the enactment of said Chapter 184 the plaintiffs and cross-defendants and their predecessors in office have continuously and consistently construed the same in this manner, which construction has not heretofore been challenged by anyone or repudiated by the courts in Montana; and that at no time have the plaintiffs and cross-defendants demanded or required of defendant and cross-complainant that it pay a gross revenue fee upon all of its interstate commerce or more than upon that portion of such revenue or commerce of said company carried on within the State of Montana.

XI

Admit that said acts declare that the fees required to be paid thereby are "in consideration of the use of the highways of the state" as alleged in Section I, thereof, but deny each and every other allegation, matter and thing [fol. 69] contained therein, except admit the appropriation made by the legislative assembly of Montana as alleged in the first paragraph thereof and admit that the State of Montana pays 45 per cent of the cost of the construction of the state highway system of the State of Montana and pays the cost of construction and maintenance of all the roads and highways in Montana.

XII

Deny each and every allegation, matter and thing in Section M thereof.

XIII

Deny each and every allegation, matter and thing in said answer and cross-complaint not herein specifically admitted, qualified or denied.

Wherefore, having fully replied to and answered the answer and cross-complaint filed herein, prays that cross-complainant take nothing by its answer and further and affirmative defense and cross-complaint and that the same be dismissed and that the plaintiffs be granted the relief prayed for in its complaint.

R. V. Bottomly, Attorney General of the State of Montana; Enor K. Matson, Counsel, Board of Railroad Commissioners of the State of Montana and Special Assistant Attorney General; Attorneys for Plaintiffs and Cross-Defendants.

Duly sworn to by Austin B. Middleton. Jurat omitted in printing.

[fol. 70] Service of the within Reply and Answer, and receipt of copy thereof, this 17th day of February, 1943, is hereby admitted.

Toomey, McFarland & Hall, Attorneys for Defendant and Cross-Complainant.

IN THE DISTRICT COURT, SILVER BOW COUNTY

MOTION TO STRIKE—Filed November 1, 1943

Comes now the Defendant Aero Mayflower Transit Company, a corporation, and moves the court to strike from Paragraph X of the "Reply and Answer" of Plaintiff, all of lines 22 through and including line 30 of said Paragraph X on page five (5) of said Reply and Answer inclusive, and all of lines 1 through 8, inclusive, on page 6, of said [fol. 71] answer, for the reasons:

1. That said allegations are surplusage,

2. That said allegations are immaterial,

3. That said allegations are irrelevant, in that (a) the construction attempted to be placed on the provisions of Chapter 184, Laws 1931, by said allegations contradicts the terms of said Chapter (b) the validity of the Chapter is to be determined by what may be done under its terms, and not by what the Board actually does in administration of the Chapter (c) the attempted construction represents and is an attempt by the Board to amend the statute to save it from manifest invalidity, by additions and qualifications within the legislative province only and (4) in that the minimum tax of $15.00 exceeds the ½ of 1% tax on gross revenues of Defendant arising from any segregation or pro-ration of interest revenues accruing from interstate operations involving Montana.

Toomey, McFarland & Hall, Attorneys for Defendant.

IN THE DISTRICT COURT, SILVER BOW COUNTY

REPLY OF DEFENDANT TO "REPLY AND ANSWER" OF PLAINTIFF—Filed November 2, 1943

Comes now the defendant Aero Mayflower Transit Company and for its reply to the answer of Plaintiff to the further and affirmative defense and cross-complaint of defendant, denies as follows:

I

Denies all of line 7 through 25 of paragraph VI of said [fol. 72] answer of page three thereof.

II

Denies all of lines 5 through 22 of paragraph VII of said answer on page 4 thereof.

III

Denies all of paragraph VIII of said answer, except that Defendant admits the allegations in lines 24 and 25 thereof on page 4 of said answer.

IV

Denies all of lines 22 through 30, inclusive, of Paragraph X of said answer of page 5 thereof and all of lines 1 through 8 inclusive on page 6 of said answer.

E. G. Toomey & E. M. Hall, Toomey, McFarland & Hall, Attorneys for Defendant.

Duly sworn to by E. S. Wheaton. Jurat omitted in printing.

[fol. 73] In the District Court, Silver Bow County

Minute Entry of Trial—November 2, 1943

This day, this cause coming on regularly for trial, plaintiffs being present and represented by counsel, E. K. Matson, Esq., and the defendant being represented by counsel, E. G. Toomey, Esq. Thereupon, upon agreement of counsel for the respective parties, causes numbered 38175 and 38265 were by the court ordered tried jointly. Thereupon the motion to strike from the reply of plaintiffs in cause numbered 38175 was by the court denied.

Thereupon, after testimony on the part of the respective parties being heard and submitted, the said matter was submitted to the court on briefs. Thereupon counsel for the respective parties requested the court to make written findings of fact and conclusions of law, and the said matter was by the court take under advisement.

IN THE DISTRICT COURT, SECOND JUDICIAL DISTRICT, MONTANA, SILVER BOW COUNTY

Bill of Exceptions of Each, Plaintiff and Defendant

Be It Remembered, that the above styled cause came on regularly for trial by the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, the Honorable Jeremiah J. Lynch, Judge, presiding, sitting without a jury, under date of November 2, 1943, plaintiffs being represented by counsel, Enor K. Matson, and the defendant being represented by counsel, E. G. Toomey. The parties having announced themselves as ready for trial, thereafter the following proceedings were [fol. 74] had and done in connection with, and the following evidence was introduced upon the trial of said cause:

COLLOQUY

The Court: "38175" and "38265"—are there two cases to be tried or just one?

Mr. Toomey: I believe there are two, Your Honor. The first case filed is 38175, brought by the Board of Railroad Commissioners against the defendant, Aero Mayflower Transit Company, and shortly thereafter the Aero Mayflower Transit Company filed a direct action against the Board of Railroad Commissioners. As I understand it, and I believe counsel will agree, the issues in both cases, 38175 and 38265, are practically identical. There is no reason why they cannot be tried together.

The Court: You may stipulate they may be tried together.

Mr. Matson: That is agreeable. I think the same facts and same proof may be used in both cases.

Mr. Toomey: It is so agreed.

The Court: Let the record so show then.

Mr. Toomey: In cause 38175, Your Honor, in order to close issues, the defendant has filed a motion to strike certain allegations from the reply and answer of the plaintiff and served a copy of that on counsel. I don't desire at this time to offer any argument on that motion, and it may be submitted.

Mr. Matson: It is agreeable to us to submit it.

The Court: All right. The motion to strike is denied. I suppose the court may, in its findings, correct any redundant or irrelevant matter.

Mr. Toomey: Yes. It may go in with that reservation. And we will file at this time the reply of the defendant to the reply and answer of the plaintiff. That simply closes the issues in the case. With that the defendant is ready, [fol. 75] Your Honor.

Mr. Matson: Plaintiff is ready.

The Court: Let the record show it is stipulated in open court by counsel that the cases will be consolidated for trial.

Mr. Matson: It is our understanding, after conversation with counsel for the defendant, that counsel are willing to agree that the facts, all facts stated in the complaint in 38175 may be considered as true for the purpose of this hearing. Of course, there are certain exceptions. So far as the incorporation of the defendant is concerned, I think it would be agreeable to stipulate that the Aero Mayflower Transit Company is a corporation existing and organized and doing business under and by virtue of the laws of the state of Kentucky instead of Indiana.

Mr. Toomey: We'll so stipulate.

Mr. Matson: And also that the name of Leonard C. Young be substituted for that of Horace F. Casey as one of the members of the Board of Railroad Commissioners.

Mr. Toomey: It may be so stipulated.

The Court: Be substituted for Horace Casey as a member of the Board?

Mr. Matson: Yes.

Mr. Toomey: With respect to the allegations of the complaint, the defendant would admit the proceeding before the Board of Railroad Commissioners which were had and set out in full in the answer of the defendant. Of course, the defendant does not admit any legal conclusions drawn by plaintiff from the admitted facts.

Mr. Matson: That is our understanding, that no legal conclusions are admitted, but the facts.

The Court: Are all allegations of the complaint, with [fol. 76] the exception of any legal conclusions therein, admitted, Mr. Toomey?

Mr. Toomey: Yes.

The Court: Does that throw the burden on you to introduce evidence at this point?

Mr. Toomey: I think we should proceed at this time.

Mr. Matson: That is our understanding.

Mr. Toomey: We will call Mr. Wheating.

E. S. WHEATING, called as a witness, being first duly sworn, testified as follows:

Direct examination.

By Mr. Toomey:

Q. May we have your name, please?
A. E. S. Wheating.
Q. Where do you live, Mr. Wheating?
A. Indianapolis, Indiana.
Q. Are you connected with the defendant Aero Mayflower Transit Company?
A. Yes, I am.
Q. And what is that connection?
A. Vice president and general manager.
Q. How long have you been vice president and general manager?
A. About eight years.
Q. What are your duties in that office?
A. Well, the administrative duties of the organization.
Q. Do you have jurisdiction over the matter of operations?
A. Yes, I do.
Q. And over the admission of the corporation to the sev-
[fol. 77] eral states in which it carries on interstate business?
A. Yes.
Q. Over the rate affairs and charges?
A. Yes.
Q. How long have you been engaged in the motor transport business, Mr. Wheating?
A. About 25 years.
Q. And what has been your experience in that connection?
A. Well, I have been engaged in practically every phase of the operation from probably the very lowest job to the one I am in at the present time.
Q. And that engagement has been continuous over the years?
A. Yes, it has.
Q. In what business has the defendant corporation engaged?
A. Just interstate motor carriers of household goods.
Q. Interstate motor carriers of household goods?
A. Yes.

Q. Tell the Court whether or not the defendant does any intrastate business in the state of Montana.

A. No, it does not.

Q. Does it do any intrastate business in any state of the union?

A. No, it does not.

Q. Is the defendant's business confined entirely to interstate operation?

A. Yes, that is correct.

Q. Do any of the revenues accruing to the defendant arise from intrastate operations in Montana?

A. No.

Q. Or from intrastate operations in any state?

[fol. 78] A. No, they don't.

Q. In other words, then, all of the revenue which accrues to the defendant is inter state service?

A. Yes.

Q. Just describe to the court what the operation is so the Judge will have an understanding.

A. Well, we move household goods, and office furniture and fixtures, and store equipment and fixtures from any point in the United States to any other point in the United States, as long as it is from one state to another. The shipments vary in size, some are small and some acquire a full van, or maybe three or four vans. We operate between all 48 states, in that service under a certificate issued by the Interstate Commerce Commission.

Q. The Aero Mayflower Transit Company is the holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission?

A. Yes, we have such a certificate.

Q. And you operate in all 48 states under one certificate?

A. Yes. That certificate provides for operation between all towns and places in the United States.

Q. What is the number of that certificate?

A. 2934.

Q. Now, with reference to the state of Montana, did the defendant, prior to the commencement of this action, No. 38175, obtain from the plaintiff Board any permit?

A. Yes, we did.

Q. For what purpose?

A. For operation through the state.

Q. And did the defendant at that time and subsequently file insurance policies with the Board?

[fol. 79] A. Yes, we did.

Q. And file a tariff with the Board?

A. I don't know that tariff was required by the Board. If one was required, it was filed, I am sure.

Q. And if one was filed, it is under the control of the clerk of the Board, is that right?

A. Yes.

Q. Now, Mr. Wheating, can you give us the totals for the years 1939 through 1942 of license fees paid by the Aero Mayflower Transit Company to the State of Montana in connection with license tax and plates for those vehicles?

Mr. Matson: We object on the ground it is irrelevant and immaterial what license fees it pays for plates, for the reason that the payment of such fees would not excuse or absolve the defendant from paying the fees due under the Motor Carrier Act.

The Court: The objection is overruled.

A. Yes, I can.

Q. Will you give us those figures?

A. For 1939—$1,535.50; for 1940—$1,250.25; for 1941—$1,330.75; for 1942—$1,195.75.

Q. Now, Mr. Wheating, does the defendant Aero Mayflower Transit Company, pay to the State of Montana any tax on gasoline by it purchased in the state?

A. Yes, we do.

Mr. Matson: We desire to enter the same objection to this.

The Court: All right. Let the objection be overruled. The Court will determine later whether this character of evidence has any application.

By Mr. Toomey:

Q. Can you give us the figures for the corresponding period, 1939 through 1942 inclusive?

[fol. 80] A. I can give you the approximate figures that we calculate for that tax.

Q. And that represents your best efforts to get at the facts?

A. Yes.

Q. What are they?

A. For 1939—$553.85; for 1940—$546.10; for 1941—$838.50; for 1942—$681.80.

Q. Now, Mr. Wheating, what is the cost figured to the defendant, Aero Mayflower Transit Company, on a per mile basis in Montana for these combined expenditures?

Mr. Matson: For the purpose of the record, we desire to object to this on the ground it is irrelevant and immaterial.

The Court: Overruled.

A. You mean for license, gas tax, and other tax?

By Mr. Toomey:

Q. Yes.

A. It is about 2⅓ to 2½ cents per mile.

Q. What is the system of figuring of the Aero Mayflower Transit Company in its operation throughout the union?

Mr. Matson: Let the record show the same objection.

The Court: Yes. Overruled.

A. Our average tax costs throughout the United States is a little less than one cent average each mile traveled.

Q. And since 1939 up to and including 1942, the cost to the Aero Mayflower Transit Company in Montana of the license fees and gasoline tax is running in excess of 2⅓ cents a mile?

A. Yes.

Q. Now, Mr. Wheating, some contention is made by the Board with respect to the right to collect the minimum fee or license or charge of $15.00 per vehicle under the gross [fol. 81] revenue tax, which provides that in Montana the carrier shall pay ½ of 1% of gross revenue with a minimum of $15.00. Can you tell us from your knowledge of the company's operation what that fee would amount to for the last several years, by years?

A. You mean from 1939 on through 1942?

Q. Yes.

A. Yes, I can.

Q. Has it been collected?

A. I have arrived at the income for that operation of the load miles operated in Montana by using an average income per mile figure based upon the probable load factor we would have had in Montana. For the year 1939, the revenue would have amounted to approximately $11,961.00.

By Mr. Matson:

Q. That is for the portion within the state of Montana?

A. That is right. The tax at ½ of 1% would have been $59.80. Now, do you want the amount of tax based on vehicles in that year?

By Mr. Toomey:

Q. Yes.

A. At that rate, the tax on the basis of the $15.00 minimum, the tax would have amounted to $660.00 in 1939. In 1940, the revenue would have approximated $11,450.00. The tax on the percentage rate would be $55.23.

Q. That is ½ of 1%?

A. ½ of 1%. And if it were collected on the basis of the minimum, the tax would have been $630.00. For 1941, the revenue would approximate $17,761.00. The tax at ½ of 1% would be $88.80. The tax on the basis of the $15.00 minimum would have been $870.00. For 1942, the revenue would have approximated $16,160.50. The tax at ½ of 1% would be $80.80 and on the basis of $15.00 mini- [fol. 82] mum would be $1,935.00.

Q. Mr. Wheating, is the operation of the defendant in the state of Montana daily and continuous?

A. No, it is occasional.

Q. And by that, you mean what?

A. Infrequent, and whenever the need arises of picking up a shipment here or passing through the state with a vehicle going to some other state.

Q. In paragraph D of the answer of the Aero Mayflower Transit Company, to the complaint of the plaintiff, we have set forth certain figures showing the operations in this interstate commerce, which involves Montana as a part of the interstate operation for the years 1937, 1938 and 1939 the first ten months. You are familiar with those figures?

A. Yes, I am.

Q. Are they true and correct?

A. Yes.

Q. To your knowledge as vice president of the company?

A. Yes, sir.

Q. And did the operation since that time run along about the same as the average of that period?

A. Very much so; slightly in excess of that.

Q. Slightly in excess?

A. Yes.

Q. As due to the war emergency?

A. No. during 1939 and 1940, and probably the fore part of 1941, there was some increase in business, but now it has dropped off instead of an increase.

Q. For what reason?

A. Conservation.

Q. Does the Aero Mayflower Transit Company continue to pay to the State of Montana the tax demanded for gaso-[fol. 83] line and licenses?

A. Yes.

Mr. Matson: Objected to for the reason heretofore given.
The Court: Overruled.

By Mr. Toomey:

Q. And all tax, demand for license plates, and tax?

Mr. Matson: Same objection.
The Court: Overruled.

A. Yes.

Mr. Toomer: You may examine.

Cross-examination.

By Mr. Matson:

Q. Mr. Wheating, you have testified as to the total gross revenue of the earnings of your company within the state of Montana based on the mileage within the state of Montana for the years 1939, 1940, 1941 and 1942?

A. Yes.

Q. Now, so far as the year 1939 is concerned, did the Board of Railroad Commissioners of the state of Montana ever demand of your company payment of any fees based on ½ of 1% for the total gross revenue of all of your revenue throughout all states?

A. Throughout all states?

Q. Yes.

A. Not to my knowledge.

Q. Has it ever made any demand of your company for payment of ½ of 1% on the gross revenue of the entire gross revenue of the company?

Mr. Toomey: To which objection is made on the ground and for the reason that the statute in question provides that the Board shall collect ½ of 1% of the gross revenue [fol. 84] from the carrier, subject to a minimum of $15.00 per vehicle and that there is no language in the statute and no suggestion in the statute that the tax shall be applicable to any revenues that arise from any part of the interstate operations in Montana. And upon the further grounds that under the law, the statute is to be tested not by what the Board actually does under it in administration, but what may be done under the statute.

The Court: The objection is overruled.

A. No, not to my knowledge.

By Mr. Matson:

Q. As a matter of fact, the demand of the Board of Railroad Commissioners, prior to the bringing of this action, was for the minimum under the gross revenue, was it not; the minimum of $15.00 per vehicle?

A. It was for the minimum of $15.00 per vehicle for, I presume, the percentage of our Montana revenue. I don't know that they computed the percentage, and on account of the rather limited operation in the state, I presume they thought they might collect the minimum.

Mr. Matson: No further cross-examination.

(Witness excused.)

Mr. Toomey: We will call Mr. Matson.

Enor Matson, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Toomey:

Q. May we have your name for the record, please.

[fol. 85] A. Enor Matson.

Q. And you are connected with the plaintiff, Board of Railroad Commissioners?

A. I am.

Q. In what capacity?

A. As secretary and counselor.

Q. And how long have you been secretary and counsel?

A. Since December 1940.

Q. And continuously up to the present time?

A. Yes.

Q. And as secretary of the Board, you have charge of its records, papers, files, etc.?

A. Yes.

Q. Have you brought with you here the Board's file in the matter of Aero Mayflower Transit Company?

A. Yes, I have.

Q. Can you find in there any demand made by the Board upon the defendant for payment of license fees tax?

A. I think, perhaps, I can, but I will have to look through it.

Q. I think it commences about 1938.

A. I find here a letter of May 11, 1938, addressed to the Aero Mayflower Transit Company and signed by Chief Clerk and Counsel for the Board of Railroad Commissioners.

Q. Is that letter a demand for payment of revenue for operation?

A. Yes, it appears to be.

Q. And what was the demand?

A. Do you want me to read the letter?

A. Yes, if you will.

A. (Reading) "Aero Mayflower Transit Company, 915 Daly Street, Indianapolis, Indiana.

[fol. 86] We have for reply your recent letter relative to our statement contained in our letter of April 28th. The $64.02 shown as a balance due on gross revenue for 1936 is made up in this manner. You registered 5 trucks for which you paid the highway compensation fee of $10.00 per vehicle. The minimum gross revenue for the year 1936 was $15.00 per vehicle, or a total of $75.00. In the four quarters of 1936 you reported on and paid a total of $10.98 gross revenue fees. Deducting the payment of $10.98 from the minimum due of $75.00 left a balance of $64.02. In the year 1937 you did not list your equipment, hence, we are unable to state whether there were 5 pieces operated or not. It is necessary for you to register this equipment and pay the highway compensation fee of $10.00

per vehicle. Then basing your figures on the number of vehicles listed, you would figure the gross revenue minimum of $15.00 per vehicle for the year 1937. Totaling the highway compensation fee on these vehicles, plus the gross revenue minimum for the same number of vehicles, you would find the total due for 1937. During 1937 you paid gross revenue fees in the amount of $41.01. You should deduct $41.01 from the total you figured due for 1937 and you would find the balance due for the year 1937. Add this balance to the $64.02, the balance due for 1936, and you would find the total balance due up to January 1, 1938. We are enclosing a form on which you should furnish a description of the vehicles to be registered for the fiscal year 1937-1938."

Q. Is that the whole of the letter?

A. That is all of the letter, signed, "Very truly yours, Board of Railroad Commissioners, Chief Clerk and As-[fol. 87] sistant Counsel." The initials "WJN" to my knowledge was Walter J. Nylan, who was then Chief Clerk and Assistant Counsel.

Q. Mr. Matson, have you found in there, in the Board's files, where the Board made any demand on Aero Mayflower Transit Company for anything except the $15.00 minimum under the gross revenue tax which the Board claims?

A. Well, it has also demanded the $10.00 fee for vehicle fee.

Q. The $10.00 for vehicle fee is under a separate statute, is that right?

A. That is right.

Q. I am referring now to the gross revenue statute, the demands of the Board under that statute, as made upon the Aero Mayflower Transit Company has always been for the $15.00 minimum fee per vehicle, is that right?

A. As far as I am able to determine now. Perhaps I should make a more definite search of the files. I think that is correct.

Q. I think that is correct. I checked the files this morning.

A. As I recall it, a statement was prepared and sent to the Board showing what the minimum fees would amount to at $15.00 per vehicle for the years 1937, 1938 and 1939, and demand was made of the company for payment, the usual minimum fees, together with the $10.00 fee per vehicle. Those fees, I think, together amounted, in the

last statement, to something around $1,900.00. I think at the time the action was started, or just before, they amounted to some $1,600.00.

Q. Have you ever found where the Board made any demand on the defendant under the gross revenue statute for taxes based on the Board's theory for pro rationing between [fol. 88] inter state and intra state revenues? Referring to intra state now, and to that part of the intra state revenues, which may have flowed from inter state in Montana?

A. I don't recall any. It is my understanding that the Board has accepted the defendant's figures in that respect, and since the ½ of 1% of the gross revenue of the operations in the state of Montana was less than the minimum, they demanded the minimum fee of $15.00 per vehicle.

Q. Do you find in the Board's file any calculations by the Board of tax on the basis of the segregation of inter state dollar generally from inter state dollar arising in Montana?

A. I haven't run across any. Of course, as far as I know, the Board has never sent its auditor to examine the books of the defendant, and therefore, it relied on the reports made by the defendant.

Q. As far as the record shows, the demand made by the Board on the defendant under the gross revenue statute has always been for the $15.00 per vehicle tax, is that right?

A. That is true as far as I know.

Q. Have *you* considered the question at all as to the effect of that demand if the ½ of 1% gross revenue tax was less than resulting from the application of the minimum tax?

A. Well, from what I know about the attitude of the Board, such ½ of 1% of the minimum of the gross operations in the state of Montana would be accepted if less than the minimum $15.00 fee.

Q. Well, do you mean the Board would so construe the statute?

A. No, I don't mean that. I think I misunderstood your question.

Q. The board could not dispense with the provision, the [fol. 89] statutory provisions for a $15.00 minimum?

A. No. What I mean to say is if the ½ of 1% of the gross revenue of that part of the business within the state

of Montana is in excess of $15.00 per vehicle, the Board would accept that; but where it is less, they would demand the $15.00 minimum.

Q. Yes, that is what I wanted to know. Mr. Matson, please understand when I ask these questions, you may make any objection you desire.

A. Sure.

Q. What does the Board do with the revenues received from the $10.00 flat tax per vehicle, and with the revenue received from the gross revenue tax?

A. I have no personal knowledge on that question. I can't answer that question because I have no personal knowledge and it would be entirely on hearsay and on what my understanding of what the law requires. I have no knowledge or information in regard to the handling of the funds or the fees because it doesn't come within my department. That is all attended to by the auditor.

Q. You know that all of these exactments go into a general jackpot used for the general purposes of the Board, for legislative purposes?

A. That is my understanding but I don't have any personal knowledge of it.

Mr. Toomey: I think that is all.

The Court: Do you want to cross examine yourself?

Mr. Matson: I don't think I have any cross-examination.

(Witness excused.)

Mr. Toomey: Now, if the Court please, we would like to [fol. 90] call Mr. Smith just briefly.

Paul T. Smith, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Toomey:

Q. May we have your name?

A. Paul T. Smith.

Q. Where do you live, Mr. Smith?

A. Helena, Montana.

Q. Are you connected with the Board of Railroad Commissioners of Montana?

A. Yes.

Q. In what capacity?

A. I am a member of the railroad commissioners and Ex Officio Public Service Commission of Montana.

Q. And have been for how long past?

A. Since December 1938.

Q. Continuously up to the present time?

A. That is right.

Q. Mr. Smith, were you present in Court and heard all the testimony of Mr. Matson, Secretary and Counselor of the Board?

A. You mean today?

Q. Yes, today.

A. Yes.

Q. Is that testimony true and correct as far as you know?

A. I believe that it is.

Mr. Toomey: That is all.

[fol. 91] Cross-examination.

By Mr. Matson:

Q. You heard my testimony with reference to the attitude of the Board so far as the collection of minimum gross revenue fee is concerned?

A. Yes.

Q. Has the Board at any time ever attempted to collect from this defendant the gross revenue fee of ½ of 1% based upon the total revenue of the defendant in all its operations throughout the state?

A. No, only as far as the state of Montana is concerned; the revenue that is received within the boundaries of the state.

Q. Has such been its attitude in all cases since you have been a member of the Board?

Mr. Toomey: Objected to on the grounds and for the reason it is an attempted effort of the Board to amend the statute.

The Court: Overruled.

A. Yes, that has been the interpretation of the Board since I have been a member.

Mr. Matson: I think that is all.

(Witness excused.)

Mr. Toomey: Now, if the Court please, I think that is all of the evidence of the plaintiff at this time. I make that remark and would like in equity to draw the attention of the Court to the fact that while the answer and cross complaint is somewhat long, it assumes to set out at length the legal functions of the Board for the purpose of showing the many activities in which it is engaged and that the revenues by it demanded are used for general legislative purposes and not relating to highways. We rest at this [fol. 92] point in chief.

Mr. Matson: May it please the Court, the plaintiff rests.

The Court: Do you want to orally argue the cases, gentlemen, or submit them on briefs?

Mr. Matson: So far as we are concerned, we are willing to submit them on briefs.

Mr. Toomey: It is agreeable with us, Your Honor.

The Court: All right. The record may show the cases are submitted on briefs and by the court taken under advisement.

IN THE DISTRICT COURT, SILVER BOW COUNTY

REQUEST OF PLAINTIFFS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the Board of Railroad Commissioners of the State of Montana, plaintiffs, for the regularly constituted Board of Railroad Commissioners of the State of Montana in the above-entitled action and requests the court to make the following findings of fact and conclusions of law in the above-entitled case.

Paul T. Keller, Secretary-Counsel for the Board of Railroad Commissioners.

Service of a copy of the foregoing request and a copy of plaintiffs' proposed findings of fact and conclusions of law admitted this 1st day of May, 1945.

Toomey, McFarland & Hall, Edmond G. Toomey, Edgar M. Hall, Attorneys for Aero Mayflower Transit Company.

[fol. 93] IN THE DISTRICT COURT, SILVER BOW COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be it remembered that this cause came on for trial on the 2nd day of November, 1945, before the above-entitled court, both parties being represented by counsel, and the matter having been submitted upon briefs, the court makes the following findings:

I

That the plaintiff is the regularly constituted Board of Railroad Commissioners of the State of Montana.

II

That the defendant, Aero Mayflower Transit Company, is a corporation organized and existing under and by virtue of the laws of the State of Indiana.

III

That all of the facts stated in the complaint are admitted, excepting the matters therein contained which are legal conclusions.

IV

That the defendant, Aero Mayflower Transit Company, a corporation, is engaged in the business of interstate hauling for hire; that such corporation hauls household goods, office furniture and fixtures, and store equipment and fixtures from any point in the United States to any other point in the United States as long as it is from one state to another; and that said defendant, Aero Mayflower Transit Company, is the holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission.

V

[fol. 94] That the said defendant, Aero Mayflower Transit Company, did business within the State of Montana in the years 1937, 1938, 1939, 1940 and 1941.

VI

That for the year 1939 the said defendant did a gross revenue business in the State of Montana of $11,961.09, and that one-half of 1% thereof would be $59.00, and that

the minimum of $15.00 per truck for the year 1939 would have amounted to $660.00; that the said defendant had a gross revenue in the State of Montana of $11,450.00 for the year 1940, and that the one-half of 1% tax thereon would have amounted to $55.25, and the $15.00 minimum tax for that year would have been $630.00; that for the year 1941 the gross revenue was $17,761.00, and one-half of 1% thereon would have been $88.80, and the tax collectible upon the basis of the $15.00 minimum would have amounted to $870.00 for that year; that for the year 1942 the gross revenue within the State of Montana was $16,160.50, and the tax at one-half of 1% would have been $80.80, and the revenue on the basis of $15.00 minimum per vehicle would have been $1,035.00.

VII

That the Board of Railroad Commissioners of the State of Montana has made due request of the defendant for said amounts and that the same still remain due, owing and unpaid by the said defendant to the State of Montana.

From the foregoing findings of fact the court makes the following conclusions:

I

That the collection of the gross revenue fees as provided by Section 3847.27, Revised Codes of Montana, 1935, is not an undue burden upon interstate commerce.

[fol. 95]

II

That the type of hauling for hire rendered by the Aero Mayflower Transit Company, a corporation, is covered by Sections 3847.23 and 3847.27, and the tax levied thereby is collectible.

III

That the Aero Mayflower Transit Company, a corporation, is indebted to the State of Montana in the sum of one-half of 1% of its gross revenue or $15.00 per vehicle minimum as required by Section 3847.27, Revised Codes of Montana, 1935.

IV

That the Aero Mayflower Transit Company, a corporation, is indebted to the State of Montana for the tax provided for by Section 3847.27 in the following sums, to-wit:

$75.00 for the year 1936; $75.00 for the year 1937; $660.00 for the year 1939; $630.00 for the year 1940; $870.00 for the year 1941; $1,035.00 for the year 1942.

That for the years 1938, 1943 and 1944 the defendant must make a return and pay the tax as required by Section 3847.27.

Done in open court this —— day of ——, 1945.

————, District Judge.

[fol. 96] In the District Court, Silver Bow County

Findings of Fact and Conclusions of Law Proposed on Behalf of Aero Mayflower Transit Company

Comes now Aero Mayflower Transit Company, a corporation, defendant and cross-complainant in the Cause No. 38175, and plaintiff in the Cause No. 38265, and having at the close of the evidence herein, requested on the minutes of the court, that the court make findings of fact and conclusions of law herein, now, within the time agreed upon by the parties for submission of proposals, in that respect, proposes the annexed findings of fact and conclusions of law in the above actions consolidated for trial and prays the court to adopt the same as its findings of fact and conclusions of law in said consolidated actions.

Toomey, McFarland & Hall. Edmond G. Toomey & E. M. Hall, Attorneys for Aero Mayflower Transit Company.

(Service and receipt of copy acknowledged June 12, 1945.)

In the District Court, Silver Bow County

(Nos. 38175 and 38265)

Findings of Fact and Conclusions of Law by the Court in Consolidated Causes

The two actions above entitled, each framed on identical or substantially identical issues, were consolidated for trial by stipulation of all parties thereto and as so consolidated came on regularly for trial on the merits in the above entitled cause on November 2, 1943, before the above

entitled court sitting without a jury, a trial by jury having been expressly waived by the parties. Evidence was offered by the respective parties, including the entire record of [fol. 97] the Board of Railroad Commissioners in this matter, and upon the close of the evidence the parties requested the court to make findings of fact and conclusions of law upon the consolidated causes after receipt of briefs and proposed findings of fact, etc., for the respective parties, at which time of receipt the cause was deemed submitted for decision, and said proposals and briefs having been received within the time agreed upon by the parties, and the court having reviewed the pleadings, evidence and statements of the parties, and now being fully advised in the premises, makes the following Findings of Fact, and enters thereon the following Conclusions of Law, by the court, viz.,

Findings of Fact

1

That Aero Mayflower Transit Company (hereinafter referred to as "Aero") is, and has been since September 1928, a corporation organized and existing under and pursuant to the laws of the State of Kentucky, with its principal office in the City of Indianapolis, State of Indiana; that it owns and operates a fleet of motor trucks, all of which are licensed under the laws of the State of Indiana and carry at all times license plates of the State of Indiana; that its business is that of transporting by motor vehicle, in interstate commerce exclusively, over the highways of the United States used household goods and office furniture, incident only to the change of residence of the owner of such goods, under a separate order for such transportation, in each instance by the owner of said goods, at the rates for such transportation set out in its schedule of rates on file with the Interstate Commerce Commission of the United States.

2

[fol. 98] That Aero Mayflower Transit Company never has done, and does not now do, or carry on, any intra business in the State of Montana and that its operations with respect to the State of Montana have at all times been interstate operations into, out of, across or through said State. That it has been granted, and now operates under, Permit No.

2934 issued to it as a common carrier by said Interstate Commerce Commission under and pursuant to the provisions of the Federal Motor Carrier Act of 1935, as amended or supplemented.

3

That the Board of Railroad Commissioners of the State of Montana, (hereinafter referred to as "Board"), is an administrative agency of the State of Montana, wholly of statutory origin, possessing only the powers and functions and entitled to discharge and exercise only the duties prescribed for it by the Legislative Assembly of Montana, as far as here material, by Ch. 184, Laws 1931 (now Sections 3847.1 to 3847.25, Revised Codes of Montana, 1935) as amended. That Paul T. Smith, Leonard C. Young and Horace F. Casey are, and have been since January 1, 1945, the duly and regularly elected, qualified and acting members of, and constituting said Board, the last two named being successors to members serving at the time these actions were commenced, and regularly substituted herein for such members.

4

That under date of October 3, 1935, the Board of Railroad Commissioners of the State of Montana, issued to Aero its Certificate, sometimes styled "Permit", No. 1354, pursuant to the provisions of Chapter 184, Session Laws of 1931, of the State of Montana, after a finding by said Board that public convenience and necessity required such operations, which "permit" granted Aero right to transport [fol. 99] property as a common carrier in interstate service only, by motor vehicles for hire, over and on the public highways of the State of Montana, and which "permit" of the State of Montana remained in full force and effect until the 9th day of October, 1939, on which latter date the said Board issued an order purporting to cancel and terminate said certificate, or "permit." That the "permit" so issued by the Board was of that class known as "Class C Motor Carriers" as defined in said Chapter 184 of the Session Laws of 1931.

5

In entering, crossing, or going out of the State of Montana, in connection with its operations, Aero has not oper-

ated, and does not operate between fixed termini or over a regular route or upon a definite schedule, nor upon charges based upon station to station rates or a mileage rate or scale, but on the other hand does enter into an order for shipment with each of its shippers, the contract price being according to the rates of Aero on file with said Interstate Commerce Commission.

6

That under date of September 19, 1939, the Board issued an order directing Aero to appear before it on October 6, 1939 to show cause, if any, why any right or rights, permit or permits, granted Aero by said Board to operate as a Motor Carrier over the public highways of the State of Montana in interstate commerce, should not be revoked and cancelled, said order to show cause being in words and figures as follows:

"BEFORE THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA

Docket No. 3075

"IN THE MATTER OF FEES OWED BY THE AERO MAYFLOWER TRANSIT COMPANY, a Motor Carrier

[fol. 100] "TO AERO MAYFLOWER TRANSIT COMPANY, INDIANAPOLIS, INDIANA:

"Whereas this Board who is charged with the administration of the Motor Carrier Act of this State has upon due investigation found that you, Aero Mayflower Transit Company of Indianapolis, Indiana, have been operating as a motor carrier for hire over the public highways of the State of Montana and are now operating as such motor carrier for hire over the public highways of the State of Montana relating to motor carriers by refusing to pay the fees required by the laws of the State of Montana as required of motor carriers under the laws of the State of Montana, and are now operating as a motor carrier for hire over the public highways of the State of Montana without complying with the laws of the State of Montana relating to motor carriers by refusing to pay said fees though various demands have been made by this Board upon you, Aero Mayflower Transit Company, to pay the

fees owed by you to the State of Montana according to the laws of the State of Montana for your operations as a motor carrier over the public highways of the State of Montana and you, Aero Mayflower Transit Company, have refused and now refuse to conform to said demands in making payment of said fees to the State of Montana.

NOW, THEREFORE, This Board being fully advised in the premises does hereby ORDER you, Aero Mayflower Transit Company of Indianapolis, Indiana, to appear before this Board at its offices in the Capitol Building, Helena, Montana, on October 6, 1939, at 10:00 A. M. of said day and show cause if any you have why any right or rights, permit or permits granted you by this Board to operate as a motor carrier over the Public highways of the State of Montana should not be revoked and cancelled by this Board because of your non-compliance with the laws of the State [fol. 101] of Montana relating to motor carriers as heretofore set forth as stated.

Done by order of the Board of Railroad Commissioners of the State of Montana this 19th day of September, 1939.

Paul T. Smith, Commissioner. Horace F. Casey, Commissioner. Austin B. Middleton, Chairman.

ATTEST: OFFICIAL. JOHN W. BONNER, Secretary and Counsel. (Seal.)

7

That on October 6, 1939, Aero appeared by its attorneys before said Board and filed its written return to said order to show cause, which said return is made a part of the complaint of defendant in Cause No. 38265, and by this reference made a part hereof as if expressly written into these findings for identification. And then and there at the hearing thereon, there was offered and received in evidence testimony in support of said return, and no other evidence was offered by the Board or received by the Board at said hearing, and said hearing was not attended by any other party or parties.

8

That under date of October 9, 1939, the Board issued an order purporting to cancel and terminate Aero's permit

issued as aforesaid, which purported order of cancellation and termination is in words and figures as follows:

"Before the Board of Railroad Commissioners of the State of Montana

Docket No. 3075. Order No. 1746.

"In the Matter of Fees Owed by the Aero Mayflower Transit Company, a motor carrier

Appearances:

E. G. Toomey, Attorney, Helena, Montana, for Aero Mayflower Transit Company.

[fol. 102] John W. Bonner, Counsel, for the Board.

"It appearing to this Board that the Aero Mayflower Transit Company of Indianapolis, Indiana, having made its return on October 6, 1939 at 10 o'clock A. M. of said day before this Board in its offices in the Capitol Building, Helena, Montana, in response to the Order to Show Cause heretofore issued by this Board in this Docket to the Aero Mayflower Transit Company why any right or rights, permit or permits granted by this Board to said Aero Mayflower Transit Company to operate as a motor carrier under the laws of the State of Montana should not be cancelled for the non-payment of fees owed by said Aero Mayflower Transit Company to the State of Montana under the laws of the State of Montana and rules and regulations of this Board.

And it further appearing to this Board that no good and legal reason exists why said fees should not be paid the State of Montana under the laws of the State of Montana by the Aero Mayflower Transit Company because of its operations as a motor carrier over the public highways of the State of Montana, and this Board after due consideration and deliberation and after being fully advised in the premises;

Does hereby cancel, revoke and extinguish Permit No. 1354, heretofore issued by this Board on October 3, 1935, to Aero Mayflower Transit Company authorizing it to transport property over the public highways of the State of Montana as a motor carrier because of said Aero May-

flower Transit Company refusing to pay to the State of Montana fees owed by it under the laws of the State of Montana and the rules and regulations of this Board because of its operations as a motor carrier over the public highways of the State of Montana.

Done in open session, at Helena, Montana, this ninth [fol. 103] day of October, 1939.

Paul T. Smith, Commissioner. Horace F. Casey, Commissioner. Austin B. Middleton, Chairman.

Attest: Official. John W. Bonner, Secretary and Counsel. (Seal.)"

Upon receipt of notice of such purported order of termination and cancellation of its said permit in Montana, Aero states that it ceased its operations in interstate commerce into, out of or across the said state of Montana, except with respect to two or three pieces of its equipment which at the time of receipt of said order were then already in or nearing the state of Montana, which equipment completed the shipments then in transit. In any event since December 5, 1939, Aero's operations in interstate commerce in Montana have been carried on under an agreement between Aero and said Board and bond posted in this court and approved by the undersigned, wherein it is recited in part:

> "In consideration of the dissolution of said restraining order, and the restoration of the Transit Company's rights to operate in interstate commerce only into, out of, through and across the state of Montana, during the pending of said litigation, the said Transit Company and its said surety do hereby agree to promptly pay to said Board of Railroad Commissioners, the aforesaid fees, together with any like fees accruing during the pendency of said litigation; the payment of which shall, on final determination of said litigation, be determined to be due and owing by it; otherwise this obligation to be null and void:"

9

That the fees demanded by the Board of Aero, referred [fol. 104] to in the Board's order of September 19, 1939 to show cause, and in its order of October 9, 1939, purport-

ing to terminate and cancel the said Montana Certificate or "Permit" No. 1354 of this defendant, are:

(A) Those described in Sections 16 and 17 of said Chapter 184 of the Session Laws of 1931, (now Sections 3847.16 and 3847.17, R. C. M. 1935), reading as follows:

"Section 16 (a). In addition to all the licenses, fees or taxes imposed upon motor vehicles in this State, and in consideration of the use of the public highways of this State, every motor carrier as defined in this Act, shall at the time of issuance of a certificate and annually thereafter, on or between the 1st day of July and the 15th day of July, of each calendar year, pay to the Board of Railroad Commissioners of the State of Montana, the sum of Ten Dollars for every motor vehicle operated by the carrier over or upon the public highways of this State.

Provided that a motor carrier engaged in seasonal operations only, where its said operations do not extend continuously over a period of not to exceed six months in any calendar year shall only be required to pay compensation fees in the sum equal to one-half of the compensation and fee herein provided, and provided further that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by motor carriers as stand-by or emergency equipment. The Board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as stand-by or emergency equipment.

(b) When transportation service is rendered partly in this State and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this Act relating to the payment of compensation and to [fol. 105] the making of annual or special reports or statements herein required and shall show the total business performed within the limits of this State and such other information concerning its operations within this State as may be required by the Board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this State.

(c) Upon the failure of any motor carrier to pay such compensation when due the Board may, in its discretion, revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be

authorized to conduct such business until such compensation shall be paid."

"Section 17. All of the fees and compensation charges collected by the Board under the provisions of this Act shall be transmitted to the State Treasurer who shall place the same to the credit of a special fund designated as 'Motor Carrier Fund'; such fund shall be available for the purpose of defraying the expenses of administration of this Act and the regulation of the business herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the Board incurred in carrying out the provisions of this Act shall be audited by the State Board of Examiners and paid out of the 'Motor Carrier Fund'. Such fund shall not come within the restriction of any laws of this State governing payment of expenses incurred in a previous year. It being intended that such fund shall be applied to the payment of any necessary costs or expenses in carrying out the provisions of this Act, whether incurred during the ensuing year or previous fiscal year, and such 'Motor Carrier Fund' or accumulations thereof are hereby appropriated for the [fol. 106] payment of the cost and expenses rendered necessary in the carrying out of the provisions of this Act; * * *" and,

(B). *Inaddition*, said Board demanded of Aero, fees prescribed by Sections 2 and 3 of Chapter 100 of an Act approved March 14, 1935 (now Sections 3847.27 and 3847.28 R. C. M. 1935), reading as follows:

"Section 2. Additional Fees. In addition to all other licenses, fees and taxes imposed upon motor vehicles in this State and in consideration of the use of the highways of this State, every motor carrier holding a Certificate of Public Convenience and Necessity, issued by the Public Service Commission, shall between the 1st and 15th January, April, July and October of each year, file with the Public Service Commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the Board a fee of one-half of one percent of the amount of such gross operating revenue; provided however that the minimum annual fee which shall be paid by —— each

Class C. carrier for each vehicle registered and/or operated under the Motor Carrier Act shall be Fifteen Dollars.

"Section 3. Disposition made of Fees. All fees collected from motor carriers shall be, by the Commission, paid into the State Treasury and shall be, by the State Treasurer, placed to the credit of the Motor Carrier Fund. All other fees and charges collected by the Commission under the provisions of this Act shall be, by the Commission, paid into the State Treasury and shall be, by the State Treasurer, placed to the credit of a fund to be known as the 'Public Service Commission Fund' and the general and contingent expenses of the Public Service Commission shall be, by the State Treasurer, paid out of said Public [fol. 107] Service Commission Fund, upon presentation of duly verified claims therefor, which claims shall have been approved by the Commission and audited by the State Board of Examiners."

10

1937. During the calendar year of 1937, twenty-five different pieces of Aero's equipment entered, crossed or went out of the State of Montana, all in interstate commerce, the same bearing Indiana license plates numbered 3867, 3888, 3919, 3868, 3922, 3856, 3874, 3930, 3923, 3858, 3859, 3902, 3905, 3906, 3908, 3915, 3921, 19710, 2906, 3860, 3889, 3938, 19727, 141594, 141671, respectively; that one or more of said motor vehicles entered, crossed or went out of the State of Montana more than once during the said calendar year of 1937, as follows:

Six pieces of such equipment made only one trip each, into, out of, or through the State of Montana; 10 different pieces of such equipment made two trips each, 1 made three trips, 3 made four trips, 2 made five trips and 3 made eight trips into, out of or through the State of Montana during the year 1937. The total number of days or parts of days during the year 1937 that all of such equipment made any use of the highways of Montana, was 227 days, or an average use per day of Montana highways in interstate commerce throughout the year 1937 by any single piece of equipment, of eight days. That all of said several pieces of equipment traveled 227 days during said calendar year of 1937 in entering, crossing or going out of the said State of Montana; that all of said several pieces

of equipment traveled 10,077 empty, and 27205 loaded, miles, a total of 37,265 miles, within the boundaries of the State of Montana for said year of 1937:

1938. During the calendar year of 1938, forty different [fol. 108] pieces of Aero's motor equipment entered, crossed or went out of the State of Montana, all in interstate commerce, the same bearing Indiana license plates numbered 3280, 3284, 3298, 3321, 3328, 3327, 3338, 3344, 3364, 3365, 3379, 3231, 3303, 3324, 3340, 3353, 3354, 3356, 3360, 3361, 3366, 3367, 3372, 3376, 3382, 3275, 3301, 3308, 3348, 3351, 15811, 941, 3222, 3273, 3330, 3368, 3384, 15820, and 3375, respectively; that some of said several pieces of equipment entered or left or crossed the State of Montana more than once during said calendar year as follows:

Ten different pieces of such equipment made two trips each, 8 made three trips each, 5 made four trips each, 1 made five trips, 1 made six trips, 1 made seven trips, 3 made eight trips each and 1 made fifteen trips each, into, out of or through the State of Montana during the year 1938. The total number of days or parts of days during the year 1938 that all of such equipment made any use of the highways of Montana, were 385, or an average use per day of Montana highways in interstate commerce throughout the year 1938 by any single piece of equipment, of nine days.

That all of said pieces of equipment traveled 385 days during said calendar year of 1938 in entering, crossing or going out of the said State of Montana, that all of said pieces of equipment traveled 18,642 empty, and 44,254 loaded, miles, a total of 62,896 miles within the boundaries of the State of Montana during said calendar year 1938.

1939. During the calendar year of 1939 up to the issuance of the temporary restraining order herein, thirty different pieces of Aero's motor equipment entered, crossed or went out of the State of Montana, all in interstate commerce, and all bearing Indiana license plates; that some of said several pieces of equipment entered or left or crossed the [fol. 109] State of Montana more than once during said calendar year, as follows:

Ten pieces of such equipment made only one trip each into, out of, or through the State of Montana; 5 different pieces of such equipment made two trips each; 4 made three trips each, 7 made four trips each, 1 made five trips each, 2 made six trips each and 1 made seven trips into, out of or

through the State of Montana during the year 1939 to September 1st, thereof. That all of said pieces of equipment traveled 403 days during said calendar year of 1939 in entering, crossing or going out of the said State of Montana, that all of said pieces of equipment traveled 18,586 empty, and 47,413 loaded, miles, a total of 65,999 miles within the boundaries of the State of Montana during said period in the year 1939. The total number of days or parts of days during the year 1939 that all of such equipment made any use of the highways of Montana was 403, as aforesaid, or an average use per day of Montana highways in interstate commerce for said period by any single piece of equipment of 13.43 days.

That Aero refused and continues to refuse to pay the fees to said defendant Board as said fees are fixed and prescribed by said Chapter 184, Laws 1931, and said Chapter 100, Laws of 1935.

11

Pursuant to the provisions of Sections 1760-1760.10, Revised Codes of Montana, 1935, Aero has during each of the years 1937, 1938, 1939, registered and licensed the aforesaid several pieces of its equipment which entered the State of Montana; that for such registration and license plates of the State of Montana it paid to the State of Montana for the year 1937 the sum of $660.50, for the year 1938, the [fol. 110] sum of $1212.52, and for the first nine months of 1939 the sum of $1473.50; that said sums so paid for said registration and license plates were payable, and paid, as compensation for the use by Aero of highways in and of the State of Montana; that by the express terms of said statute all of such registration and license plate fees are appropriated and allocated to funds to be used by and in the State for the construction, repair and maintenance of highways of and in the State of Montana.

That the total amount paid by the Aero in the calendar year 1937 for registration and license plates, public service permits and fees, mileage taxes, and other taxes; to the several States of the United States, for the use of the highways of the several States, which sums of money are under the respective statutes used for the construction, improvement and maintenance of highways, and exclusive of property taxes, was $81,522.60; for the calendar

year 1938 the sum of $85,284.25; for the first nine months of the year 1939 the sum of $60,984.97.

That, in addition to the license taxes and exactions aforesaid demanded by the State of Montana from Aero for the use of Montana highways in the conduct of the interstate business of Aero, Aero pays to the State of Montana further and additional taxes for the operation of its motor vehicles, into, out of, through or across the State of Montana, in this to-wit:

Chapter 95, Laws of Montana, 1931 (Sections 2381.1-2396.9 Revised Codes of Montana, (1935) followed by initiative measure No. 41, adopted by a vote of the people of Montana at a general election held November 8, 1938, effective by virtue of proclamation of the Governor of Montana on November 13, 1938, provide an excise or license tax for [fol. 111] the privilege of engaging in or carrying on the business of refining, manufacturing, producing, impounding or selling, shipping, transporting, importing and distributing gasoline for use in motor vehicles, of five cents per gallon, which tax is, in practice, exacted from every buyer and purchaser of gasoline in the State of Montana and Aero, in the conduct of its interstate transportation business into, out of, across and through the State of Montana, purchases large quantities of said gasoline upon which it pays directly the said tax of five cents per gallon, all of the proceeds of which taxes are used by the State of Montana for the construction, preservation and maintenance of the roads and highways of the state, including the Federal Aid Highway system in Montana, and all of which proceeds are, in addition, pledged to the payment of state highway treasury anticipation debentures, under the initiative act aforesaid, issued to borrow money for the construction, betterment and maintenance of the state highways and roads of the State of Montana, including the federal aid system. In the year 1937, Aero paid an approximate total of $745.30 to the State of Montana for such gasoline taxes, for the year 1938 an approximate total of $1257.92 and for the year 1939 to the date hereof an approximate total of $1649.98 for such gasoline taxes.

The moneys paid by Aero to the State of Montana, Motor Vehicle License Department, and to the State of Montana, for such Gasoline License-Highway Debenture Tax, exceeded in the years 1937 and 1938, two cents for every mile

traveled via motor vehicle operated by plaintiff in interstate commerce over the highways of Montana and in the year 1939, exceeded two and one-half cents for every like mile.

That due to the sparesely settled character of the State [fol. 112] of Montana and its relatively small populace and due, further to the fact that vast districts are not populated to any extent, and to great distances between populated centers, it is difficult to obtain a return load out of Montana because of the lack of business for Aero originating in said state, the total miles traveled by Aero's motor vehicles in interstate commerce in Montana in 1937 and 1938 and for the first ten (10) months of 1939 did not equal the average mileage per year per truck throughout the United States of America for Aero's operations. The total number of days all trucks of Aero were in the State of Montana, traveling loaded or unloaded, averaged a little in excess of one truck per each day of these years; and the empty mileage traveled in the State of Montana in 1937 was 37%, in 1938 was ~~over 42%,~~ and for the first ten months of 1939, 40% of total mileage traveled in Montana, against like percentage for the United States of 25%. A fair and reasonable charge as compensation for the right of using the highways of the State of Montana in conducting its business in interstate commerce is much less than the per traveled mile cost set forth above.

That such charges so collected by said departments of the government of said state constitute and are a reasonable compensation to be paid by Aero for the occasional use of Montana highways in interstate commerce or for any other benefit received by Aero from said State or any department thereof. That a portion of such license plate and gasoline tax charges is excessive and unreasonable and the same, together with any additional charges sought to be collected by the Board herein, constitute and are, and if collected in the future, will be, unreasonable, oppressive and unconstitutional burdens upon interstate commerce [fol. 113] as conducted by Aero in that said charges do and will exceed any proportionate benefit or advantage or protection to Aero.

Conclusions of Law

A

The amounts of money paid by Aero for registration, license plates and gasoline license-highway debenture taxes,

and the application of such funds to the highways of the State of Montana, including the Federal Aid Highway system, constitute and are more than a fair and just compensation to the State of Montana for the use of its highways by Aero in its operations in interstate commerce.

B

That the Board, by its action in making the said Order complained of herein, is attempting to prevent Aero from exercising its right to engage in interstate commerce, as aforesaid, when Aero has paid much more than a fair and reasonable compensation to other departments of the state, having jurisdiction over highways and highway traffic, and such other departments have collected from Aero such license plate and gasoline tax charges as compensation for permission granted to so operate within the state.

That during the year 1937, Aero's vehicles traveled a total of 7,826,046 miles throughout the United States, in 1938 a total of 8,348,558 miles and for the first nine months of the year 1939 a total of 6,818,501 miles; that the average cost for each of said traveled miles throughout the United States in said periods for license fees, gasoline taxes, Public Service Commission permits, property taxes and all other taxes, charges of every kind and character, was slightly less than 1¢ per traveled mile.

C

That the attempt of the Board of Railroad Commissioners [fol. 114] of the State of Montana to exact from Aero the ten ($10.00) Dollars per truck fee fixed by Sec. 3847.16, Revised Codes of Montana, 1935, and the said order of the Board of Railroad Commissioners of the State of Montana, No. 1746 in Docket No. 3075, of October 9, 1939, attempting to force plaintiff to pay said charge by denying plaintiff all right to operate in interstate commerce over Montana highways, is null and void and violates the due process of law clause and, further, the equal protection of the laws clause, of the Fourteenth Amendment to the Constitution of the United States and the due process of law clause in Sec. 27 of Article III of the Constitution of the State of Montana, in that:

(a) The said Board failed to make any findings of fact consequent on the proceedings in said Docket No. 3075

and proceeded to an order therein without any findings of fact upon the record in said docket, as affirmatively appears from the face of said alleged order.

(b) The said Ten Dollar per motor vehicle license fee or tax, provided by Sec. 3847.16, Revised Codes of Montana, 1935, is, by the terms of Chapter 184, Laws 1931, applicable only, if at all, to the operations of motor carriers as defined in said act, which operations are intrastate in character, and relate and cover only motor carriers licensed by said Board for the transport of freight, goods, and commodities in intrastate commerce between points wholly within the State of Montana, and exclusively subject to the jurisdiction of said state, and to the jurisdiction of said Board as limited by the Legislative Assembly of Montana.

(c) That none of the proceeds from said Ten Dollar per motor vehicle tax assumed to be collected by said Board and transmitted to the State Treasurer of the State of Montana and by that officer carried in a special fund [fol. 115] known as "Motor Carrier Fund" is used for the construction, maintenance, improvement or betterment of any roads or highways, bridges or highway facilities in the State of Montana; that said Board is not authorized by the provisions of Chapter 184, Laws 1931, or any other law of the State of Montana, to appoint or set up any inspectors, field men, or supervisors under and in connection with Chapter 184, Laws 1931, and the attempted regulation of the business of motor carriers under the terms of said act is in no manner related to the use of the highways, or roads of the State of Montana by motor carriers. That none of the proceeds of such Ten Dollar License fee is expended by said Board or any department of the state government for any purpose or benefit to plaintiff in its interstate commerce operations.

D

That if said Ten Dollar per vehicle license fee, as prescribed by Sec. 3847.16, R.C.M. 1935, must be construed as contended by said Board, i.e., as applicable to the opertions of Aero in interstate commerce into, out of, through and across the State of Montana, the said attempted license, fee or tax, is null and void in contravention of clause 3 of Section 8 of Article I of the Constitution of the United States of America and the due process of law clause of

the Fourteenth Amendment to the Constitution of the United States, and section 27 of Article III of the Constitution of Montana, in that:

(a) The State of Montana, by and through said Board of Railroad Commissioners, or otherwise, is without power to tax interstate commerce.

(b) The said tax, as thus laid and construed, indiscriminately covers both intrastate commerce and interstate commerce, is not capable of separation and application to each commerce, and fails as a whole in its attempted appli- [fol. 116] cation to the operation of this plaintiff, and this court is without power to re-write the statute under guise of pretended "construction" when the legislature has written it as it stands.

(c) None of the fees attempted to be collected by the Board of Railroad Commissioners of the State of Montana from Aero and transmitted to the State Treasurer of the State of Montana and by him carried in the so-called "motor carrier fund" is appropriated by law, or in practise employed, for the construction, maintenance or preservation of any state highways or of any roads of the State of Montana, or for any purpose of benefit to Aero in its interstate commerce operations, and under such circumstances the said fees are a burden on interstate commerce, and not an aid to the highways over which such commerce moves.

(d) The said attempted charge of Ten Dollars ($10.00) per truck is a flat and arbitrary exaction and does not bear any reasonable relation to the actual use of the highways of Montana by Aero, no part of said charge being levied or used for highway purposes, and the same is in no way based upon the actual use of the highways of Montana by this plaintiff.

(3) That the total of said Ten Dollars ($10.00) per truck fees demanded of Aero, together with like sums paid to the Board of Railroad Commissioners by motor carriers in fact subject to the provisions thereof, is excessive and more than is reasonably necessary or proper to defray the expenses of the administration of the Act and the regulation of the business, by said Board of Railroad Commissioners.

(f) That the demanded fees from the flat Ten Dollar tax, (which tax is in addition to license plate and gasoline excise taxes paid by Aero) of $250.00 for the year 1937, [fol. 117] amount to an excessive, exorbitant, unreasonable and burdensome charge of over 7/10ths cents per traveled mile by Aero within the confines of the State of Montana in said year; that the demanded fees of $400.00 for the year 1938 and the demanded fees of $300.00 for the year 1939 amount respectively to an excessive, exorbitant, unreasonable and burdensome charge of more than 6/10ths cents per traveled mile in 1938 and more than ½¢ per traveled mile in 1939 by this plaintiff within the confines of the State of Montana.

That said Board does not furnish any police inspection, protection or supervision in connection with its pretended regulation under said Ten Dollar Tax.

(g) That a reasonable charge to Aero for the purpose of defraying the expenses of administration and the regulation of the business by the Board of Railroad Commissioners is less than the amount demanded;

(h) That the fees demanded for each of the years in question are in each instance more than the privilege is worth.

(i) That the fees attempted to be collected by the Board of Railroad Commissioners from Aero under said section 16 of Chapter 184 aforesaid, for each of said years, are in and of themselves excessive, exorbitant, unreasonable in amount, and constitute an undue and unjust burden on the interstate commerce transacted by Aero and that said demanded fees, taken in connection with the fees already paid to the State of Montana for the registration of and license plates for its several vehicles during the periods in question, constitute and are thereby a greater undue and unjust burden on the interstate commerce transacted by Aero.

[fol. 118] E

That the attempt of said Board of Railroad Commissioners of the State of Montana to collect and exact from Aero, for and on account of its operations in interstate commerce as aforesaid, a fee of one-half of one per cent *of the gross operating revenue of Aero from all its business in*

the United States of America; or even all its interstate business in the geographical area of Montana, subject to a stated annual minimum of $15.00 for each vehicle registered and/or operated under the Montana Motor Carrier Act, and the order of said Board No. 1746 in Docket No. 3075, is wholly unlawful, null and void, in that:

(a) The said tax or fee, if applicable to the operations of any motor carrier, is confined and is intended to be confined to the operations of motor carriers operating only in Montana and, as such, is in no respect applicable to the national interstate operations of Aero, or to the exclusively interstate operations of Aero through the geographical area of Montana.

(b) The said gross revenue tax, with annual minimum (as so construed) is an attempt by the State of Montana, through its *Public Service Commission,* to burden the operations of motor carriers whose respective businesses derive no benefit or advantage from the regulation of public utilities within the State of Montana, with part of the cost of administration of the *Public Service Commission of the State of Montana,* which Commission, by the provisions of Sections 3879-3913, Revised Codes of Montana, 1935, is charged with the regulation of public utilities in the State of Montana, i.e., utilities privately owned or publicly owned, distributing heat, street railway service, light, power in any form or by any agency, water for [fol. 119] business, manufacture, household use or sewerage service, telegraph or telephone service to the general public, and none of the activities of the said *Public Service Commission of the State of Montana* is in any manner or respect related directly or indirectly, to the regulation of the business of motor carriers over the highways of the state of Montana, or to the construction, maintenance, betterment and improvement of any roads or highways in Montana, or to the policing of the same or of any regulation of motor carriers, and none of its activities is of any benefit or advantage to plaintiff or has any relation to plaintiff or its operators.

That the Public Service Commission of Montana is a wholly separate administrative agency of the State of Montana (Sec. 3880, R.C.M. 1935) and when the Legislature writes in the words, "Public Service Commission of Montana", referring to an agency for collection of a tax, this

court has no power to write in the name of another agency. (Section 10519, R.C.M. 1935, the law of Montana since 1877.)

That if the so-called gross operating revenue tax with annual minimum was, by gross abuse of the powers of judicial interpretation to be construed as collectible by the Board of Railroad Commissioners of Montana (and not the Public Service Commission) and to be construed as applicable to the operations of Aero in exclusive interstate commerce, (and such statute is so construed by said Board of Railroad Commissioners,) then the said Sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, are, and each of them is, unconstitutional, null and void in that:

(a) The said statutes and the action of the Board thereunder violate Clause 3, Section 8, Article I of the Constitution of the United States of America and, in addition, the due process of law clause and the equal protection of [fol. 120] the laws clause of the Fourteenth Amendment to the Constitution of the United States of America and, further, the due process of law clause of Section 27 of Article III of the Constitution of the state of Montana, in that the State of Montana is without power, right or authority to tax the interstate commerce of Aero, such being the only commerce in which it engages.

(b) The State of Montana is without right, power or authority to apply, collect or exact an occupation tax or privilege tax indiscriminately applied to both intra-state business and interstate business, without regard for the substantial distinctions between the two types of businesses, and without apportionment, or basis of apportionment, so as clearly to exclude from its operation and effect the business of Aero as engaged exclusively in interstate commerce.

(c) If said so-called gross operating revenue tax is to be construed as a property tax upon property of Aero employed within the State of Montana, the same is unconstitutional and void in that the same is not based upon any assessment or consideration of a just valuation of such property and therefor the same is not assessed or levied or sought to be collected in accordance with the requirements of Article XII, Sections I and II of the Montana Constitution.

(d) No part of the fees under said Sections are exacted as compensation for the use of any of the highways of Montana by Aero; such fees bear no relation whatsoever to the use of said highways; no part of them is to be used or is usable for the construction, improvement, repair or maintenance of any of the highways of Montana, but on the other hand, by the express terms of said Act, all of said fees are paid into the State Treasury, to the credit of the Motor Carrier Fund, referred to in Section 17, of Chapter 184 of the laws of 1931.

[fol. 121] (e) The fees provided by said Sections purport to be equal to one-half of one per cent of the amount of gross operating revenue of Aero (and all others similarly situated) with the proviso that with respect to each Class "C" carrier, as is Aero, a minimum annual fee shall be $15.00 per each vehicle registered and/or operated under the Motor Carrier Act; such provision wholly fails to make any distinction between gross receipts in interstate and gross receipts in intrastate commerce; the minimum of $15.00 per truck is an arbitrary, capricious figure and without warrant in law.

(f) The fees proposed to be exacted by the Board of Railroad Commissioners under this section constitute and are an occupation tax, and therefore, are not applicable or assessable or collectible against Aero, which is engaged solely in interstate commerce, under the protection of the Constitution of the United States and of the government of the United States which has affirmatively and extensively entered into the field of regulating interstate commerce by motor vehicle under the Federal Motor Carrier Act of 1935, as amended, in accordance with Permit No. 2934, issued to it by the Interstate Commerce Commission of the United States.

(g) All receipts of Aero are paid to it and are payable to it at its principal office in the State of Indiana, and no part of its receipts are paid to or payable to it in the State of Montana. The fees under said sections reach and cover indiscriminately, and without apportionment, the gross compensation of the interstate commerce carried on by Aero and said sections contravene in entirety the said provisions of the Federal and State Constitutions aforesaid as applied to receipts from interstate commerce.

(h) In its practical operation the enforcement of the [fol. 122] provisions of said Sections against Aero amount to an unlawful and unwarranted discrimination against interstate commerce.

(i) The said sections attempt to assess, lay and collect a privilege tax upon the receipt of plaintiff's gross income from and in interstate commerce.

(j) None of the proceeds from said gross operating revenue tax, with annual minimum, is directed by law to be used or employed, and in practice none thereof is used or employed, in the construction, maintenance, betterment or improvement of any roads or highways in the State of Montana, for any purpose or benefit to Aero or any operators in interstate commerce, or intrastate commerce, but all of said fees are, in truth and in fact, directed to be used and are used for the general and contingent expenses of the Public Service Commission of the State of Montana, a legislative agency confined to the regulation of public utilities in the State of Montana as defined by Section 3881, Revised Codes of Montana, 1935, and the statute, as it stands and must be construed in view of its unmistakable language, represents an attempt to defray some part of the cost of representing public utilities by the Public Service Commission of Montana, at the expense of operators of motor vehicles in interstate and intrastate commerce, over whose businesses the Public Service Commission of Montana has utterly no control in law or in fact.

(k) That the statute is to be tested by what may be done under it and not by what the administrative agency may determine to do under it, and the statute contains no provision, rule or standard for apportionment of tax between interstate and intrastate commerce, and this court has no power to legislate such provision or standard, and therefore the statute violates the due process of law clause of [fol. 123] the Federal and State Constitutions and the Commerce Clause of the Federal Constitution.

F.

That in Cause No. 38175, Aero is entitled to judgment against the Board in accordance with the prayer of Aero's Answer and Cross-Complaint therein, and that in Cause No. 38265, Aero is entitled to judgment against the Board

in accordance with the prayer of its complaint therein, each party to pay its respective costs. Judgment and Decree to be signed by the undersigned.

Done and dated this — day of ——, 1945.

District Judge.

[fol. 124] IN THE DISTRICT COURT, SILVER BOW COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed June 23, 1945

This case heretofore came regularly on for trial before the court sitting without a jury, the plaintiffs being represented by counsel, Enor K. Matson, Esq., and the defendant being represented by counsel, E. G. Toomey, Esq. Thereupon, witnesses were examined and evidence was introduced in behalf of said parties and the evidence being closed on the day the trial began the cause was submitted for consideration and decision on briefs to be thereafter handed in by said counsel and was by the court taken under advisement.

The court being now fully advised in the premises makes its findings of fact and conclusions of law herein as follows, to-wit:

FINDINGS OF FACT

1. That the plaintiffs, Paul T. Smith, Leonard C. Young and Horace F. Casey are now and for several months past have been the duly elected, qualified and acting members of the board of railroad commissioners of the State of Montana.

2. That the defendant is now and ever since September, 1928, has been a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky.

3. That in the years 1937, 1938 and 1939 the defendant owned and maintained a fleet of motor trucks which were used by it in transporting for valuable considerations household goods and office furniture, in interstate commerce exclusively, over and upon the highways of the United States; that during said years it so operated under a permit issued to it by the Interstate Commerce Commission of the United States.

[fol. 125] 4. That in the year 1937 the defendant operated twenty-five motor vehicles over and upon the public highways of the State of Montana in the conduct of its said business; that in the year 1938 the defendant operated forty motor vehicles over and upon the public highways of the State of Montana in the conduct of its said business, and that in the year 1939 the defendant operated forty-four motor vehicles over and upon the public highways of the State of Montana in the conduct of its said business.

5. That the defendant has refused to pay to said Board of railroad commissioners for the said years 1937, 1938 and 1939 the fees prescribed by Section 3847.16, Revised Codes of Montana, 1935, for the reason as it contends that as to it the said section is invalid; that the defendant likewise has refused to pay to said board for the said years 1937, 1938 and 1939 the annual fees prescribed by Section 3847.27, Revised Codes of Montana 1935, for the reason as it contends that as to it the said section is invalid.

Conclusions of Law

From the foregoing findings of fact the court draws the following conclusions of law, to-wit:

1. That section 3847.16, Revised Codes of Montana, 1935, is a valid exercise of legislative authority and should be obeyed.

2. That section 3847.27, Revised Codes of Montana, 1935, as applied to the defendant is invalid for the reason that it fails to specify any method by which the gross operating revenue of the defendant in the state of Montana for any year may be determined, and for the further reason that the Public Service Commission of the state of Montana mentioned as the administrative body in sections 3847.26, 3847.27 and 3847.28, Revised Codes of Montana 1935, has nothing [fol. 126] to do with the regulation and supervision of motor carriers using the public highways of the State of Montana.

3. That the defendant should be restrained and enjoined from operating its motor vehicles over and upon the public highways of the state of Montana until it has paid the said board of railroad commissioners the sum of two hundred fifty dollars as annual fees for the year 1937, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1938, until paid; the sum of four hundred

dollars as annual fees for the year 1938, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1939, until paid; and the sum of four hundred and forty dollars as annual fees for the year 1939, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1940, until paid.

4. That the plaintiffs are entitled to their costs herein expended.

Let a decree be entered herein accordingly.
Done in open court this 23rd day of June, 1945.

Jeremiah J. Lynch, Judge.

ORDER SETTLING BILL OF EXCEPTIONS

I, Jeremiah J. Lynch, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, and who presided at the trial of the above entitled cause, do hereby certify that the above and foregoing Bill of Exceptions proposed by the plaintiffs and, separately, proposed by the defendant, is full, true and correct, and contains all of the evidence and testimony introduced upon the said trial, together with all matters and proceedings had at the trial, and the orders of the court then and thereafter made in the course of said action, and the same is by me signed, settled and allowed as the Bill of Exceptions in said cause available to each, the plaintiffs and the defendant for all purposes.

Dated this 29th day of October, 1945.

Jeremiah J. Lynch, Judge.

[fol. 127] IN THE DISTRICT COURT, SILVER BOW COUNTY

AMENDED FINAL JUDGMENT—August 31, 1945

Be it remembered that this case came on regularly for trial before the court, sitting without a jury, on the second day of November, 1943, Enor K. Matson, Esq., appearing as attorney for the plaintiffs and E. G. Toomey, Esq., appearing as attorney for the defendant, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the respective parties having

filed Proposed Findings of Fact and Conclusions of Law and Briefs in support thereof, and the court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law, and having directed that Judgment be entered in accordance therewith, and the court having heretofore and on the 29th day of June, 1945, entered its judgment, and it now appearing that said judgment does not follow the Findings of Fact and Conclusions of Law heretofore entered by the court and that said Judgment should be superseded by this amended judgment:

Now therefore, by reason of the law and the findings aforesaid, it is hereby ordered, adjudged and decreed:

I. That the defendant be and it hereby is restrained and enjoined from operating its motor vehicles over and upon the public highways of the state of Montana until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Two Hundred Fifty Dollars ($250.00) together with interest thereon from the first day of January, 1938, until paid; the sum of Four Hundred Dollars ($400.00) together with interest thereon from the first day of January, 1939, until paid, and the sum of Four Hundred Forty Dollars ($440.00) together with Interest [fol. 128] thereon from the first day of January, 1940, until paid. Together with the plaintiffs' costs herein expended.

II. It is further ordered, adjudged and decreed that the plaintiff Board be and it is hereby denied any injunctive or other relief insofar as the refusal of the defendant to pay to the plaintiff Board for the years 1937, 1938, 1939 the annual fees prescribed by Section 3847.27, Revised Codes of Montana, 1935, is concerned.

III. It is further ordered, adjudged and decreed that said Board be and it is hereby enjoined and restrained from enforcing or applying against defendant any of the provisions of Section 3847.27, Revised Codes of Montana, 1935, and in particular from exacting any of the fees and taxes therein specified.

Dated this 31st day of August, 1945.

Jeremiah J. Lynch, District Judge.

[fol. 128a] IN THE DISTRICT COURT, SILVER BOW COUNTY

NOTICE OF APPEAL TO SUPREME COURT OF MONTANA BY BOARD OF RAILROAD COMMISSIONERS OF MONTANA

To the Defendant, Aero Mayflower Transit Company, a corporation, and to Messrs. Toomey, McFarland & Hall, attorneys for said defendant:

You, and each of you, are hereby notified and will please take notice that the plaintiffs, Board of Railroad Commissioners of the State of Montana, Paul T. Smith, Leonard C. Young and Horace F. Casey, as members of and constituting the Board of Railroad Commissioners of the State of Montana, hereby appeals to the Supreme Court of the State of Montana from that portion of the Amended Judgment of the above entitled cause duly given, made and entered on August 31, 1945, wherein said court denied this plaintiff relief against the above named defendant in certain respects.

This appeal is taken by the plaintiffs above named only from so much of said amended judgment as contained in paragraphs II and III thereof, being that portion of the amended judgment denying said plaintiffs relief in so far as the annual license fee prescribed by Section 3847.27, Revised Codes of Montana, 1935, is concerned, and upon all questions of law and fact herein.

Paul T. Keller, Attorney for Plaintiffs.

Service of the above and foregoing Notice of Appeal admitted and copy thereof received this 26 day of November, 1945.

E. G. Toomey, Attorney for Defendant.

[fol. 128b] IN THE DISTRICT COURT, SILVER BOW COUNTY

NOTICE OF APPEAL TO SUPREME COURT OF MONTANA BY AERO MAYFLOWER TRANSIT COMPANY

To the Plaintiffs, Board of Railroad Commissioners of the State of Montana, Paul T. Smith, Leonard C. Young and Horace F. Casey, as members of and constituting the Board of Railroad Commissioners of the State of Mon-

tana; and to Hon. Paul T. Keller, Counsel for said Plaintiffs:

You, and each of you, are hereby notified and advised, and will please take notice, that the Defendant, Aero Mayflower Transit Company, a corporation, hereby appeals to the Supreme Court of the State of Montana from that certain portion of the Amended Final Judgment in the above entitled cause, duly given, made and entered on September 1st, 1945, wherein it is Ordered, Adjudged and Decreed, as follows:

> "I. That the defendant be and it hereby is restrained and enjoined from operating its motor vehicles over and upon the public highways of the state of Montana until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Two Hundred Fifty Dollars ($250.00) together with interest thereon from the first day of January, 1938, until paid; the sum of Four Hundred Dollars ($400.00) together with interest thereon from the first day of January, 1939, until paid, and the sum of Four Hundred Forty Dollars ($440.00) together with interest thereon from the first day of January, 1940, until paid. Together with the plaintiffs' costs herein expended."

This appeal is taken by defendant above named to only so much of said Amended Final Judgment as is above quoted, but upon all questions of law and of fact herein affecting the same.

Edmond G. Toomey and E. M. Hall, Toomey, McFarland & Hall, Attorneys for Defendant.

Service of the above and foregoing Notice of Appeal admitted and copy thereof received this 26th day of November, 1945.

Paul T. Keller, Attorneys for Plaintiffs.

[fol. 128c] IN THE SUPREME COURT OF MONTANA

SPECIFICATIONS OF ERROR BY AERO MAYFLOWER TRANSIT COMPANY ON ITS APPEAL—Filed March 13, 1946

(1) The court erred in overruling the special and general demurrer of Aero to the complaint of the Board. (Tr. pp. 7-9; 105)

(2) The court erred in refusing or failing to make findings of fact as proposed by Aero. (Tr. pp. 111-142)

(3) The court erred in refusing or failing to make conclusions of law as proposed by Aero. (Tr. pp. 131-142)

(4) The court erred in refusing or failing to make conclusions of law affirming that the Ten Dollar per motor vehicle license tax attempted to be provided by Section 3847.16 R.C.M. 1935, is null and void under the due process of law clause of the 14th Amendment to the Constitution of the United States, and under Sec. 27 of Article III of the Constitution of Montana. (Tr. pp. 132-136)

(5) The court erred in making its Conclusion of Law No. 1. (Tr. pp. 143-144)

(6) The court erred in making its Conclusion of Law No. 3. (Tr. p. 144)

(7) The court erred in making and entering part of its judgment, i.e., Paragraph numbered I therein (Tr. pp. 82) restraining defendant from operating in interstate commerce over the highways of Montana until it paid the Ten Dollar per vehicle tax for the years 1938, 1939 and 1940. (Tr. pp. 81-82½)

(8) The court erred in admitting evidence, over objection, as follows:

[fol. 128d] "Q. Has it ever made any demand of your company for payment of ½ of 1% on the gross revenue of the entire gross revenue of the company?

Mr. Toomey: To which objection is made on the ground and for the reason that the statute in question provides that the Board shall collect ½ of 1% of the gross revenue from the carrier, subject to a minimum of $15.00 per vehicle and that there is no language in the statute and no suggestion in the statute that the tax shall be applicable to any revenues that arise from any part of inter-state operations in Montana. And upon the further grounds that under the law, the statute is to be tested not by what the Board actually does under it in administration, but what may be done under the statute.

The Court: The objection is overruled.

A. No, not to my knowledge."

9. The court erred in finding and concluding that Section 3847.16 R.C.M. is a valid and constitutional statute of the State of Montana.

[fol. 128e] IN THE SUPREME COURT OF MONTANA

SPECIFICATIONS OF ERROR BY BOARD OF RAILROAD COMMISSIONERS OF MONTANA ON ITS APPEAL—Filed January 5, 1946

1. In overruling the objection to evidence regarding the state license fee for the reason that such evidence was immaterial. (Tr. 89)

2. In failing to adopt the conclusions of law of this appellant. (Tr. 107 to 110)

3. In making its Conclusion of Law in paragraph designated 2 of its Findings of Fact and Conclusion of Law of the Court for the reason that the same is contrary to the evidence and to the law. (Tr. 142 to 144)

4. In finding Section 3847.27 invalid in the Court's Conclusions of Law.

[fol. 129] [File endorsement omitted]

IN SUPREME COURT OF MONTANA

No. 8646

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, Paul T. Smith, Leonard C. Young and Horace F. Casey, as Members of and Constituting the Board of Railroad Commissioners of the State of Montana, Plaintiffs and Appellants on Appeal of said Board, and Respondents on Cross-Appeal of Aero Mayflower Transit Company, a Corporation,

v.

AERO MAYFLOWER TRANSIT COMPANY, a Corporation, Defendant and Respondent on Appeal of said Board, and Appellants on Cross-Appeal of Aero Mayflower Transit Company, a Corporation

Submitted: April 13, 1946. Decided: June 29, 1946

OPINION—Filed June 29, 1946

[fol. 130] Mr. Justice MORRIS delivered the Opinion of the Court:

This controversy involves the question as to what extent a state may impose burdens in the way of licenses and taxes upon motor carriers engaged in interstate commerce for operating their vehicles over the highways of the state. Such exactions are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways.

The Board of Railroad Commissioners of the State of Montana, hereinafter referred to as the Board, brought this suit to restrain the Aero Mayflower Transit Company, a Kentucky corporation, hereinafter referred to as the Company, from operating its motor vehicles over the highways of the state until it shall have complied with the provisions of Chapter 310 of the Political Code, known as the Motor Carriers Act, comprising sections 3847.1 to 3847.28 of the Revised Codes, inclusive. A restraining order was issued as prayed for by the Board, and the Company for some

months discontinued operations in the state, but later filed a bond with the court and the court made an order permitting the Company to continue operations pending determination of the issues involved.

There is no dispute as to the facts. The Company is engaged in the motor transportation of used or second hand household goods and office furniture from one state to another for hire. It does not transport any goods of any nature or kind from one point to another in the same state. The only transportation it engages in so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to [fol. 131] a destination is some third state. It alleges that it operates under permit No. 2934 issued to it by the Interstate Commerce Commission. It appears that in October 1935 the Board issued to the Company a "Class C" permit. In September 1939 the Board issued an order directing the Company to show cause why its permit to operate its vehicles over the highways of Montana should not be revoked. A hearing followed on October 6, 1939, and on the succeeding 9th of October the Board issued an order cancelling the permit theretofore issued to the Company on the ground that the Company was using the highways of the state "In an unlawful and unauthorized" manner. The position of the Board appears to be that the Company may not use the highways of the state until it shall have applied to the Board and been granted a permit and paid the taxes and fees imposed by statute.

To the complaint of the Board in the instant action the Company interposed both a special and general demurrer, and such demurrers being overruled, the Company answered by way of general denial followed by cross-complaint. The cross-complaint at great length sets out the various acts of the parties showing the conflicting views of each which gave rise to the issues involved in the action. Briefly stated the Company contends that the Motor Carriers Act, supra, is not applicable to interstate commerce, but governs those engaged in intrastate commerce only; that sections 3847.16 and 3847.17, if applied to it, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and sections 1 and 11 of Article XII of the Constitution of Montana.

It appears that the state has heretofore and for some years collected two separate exactions from the Company:

The Registration License Tax authorized by sections 1760-[fol. 132] 1760.10, Revised Codes; and the tax on sales of gasoline, authorized by sections 2381.1 to 2396.9, Revised Codes. The further exactions challenged by the Company in this action are (a) the "Ten Dollar per vehicle 'straight' or 'flat' tax," authorized by sections 3847.16 and 3847.17, Revised Codes, and (b) The tax of one-half of one per cent of the amount *of gross revenue*, from wherever derived by the defendant in the United States, under section 3847.27," which is the construction the Company places upon that section, with a minimum fee of $15.00 for each vehicle operated by the Company in Montana.

While there is but one set of findings of fact, conclusions of law, and a single judgment, two separate actions were entered on the docket in the lower court, action No. 38175 in which the Board was the complainant, and action No. 38765 in which the Company was the complainant. When the actions came on for hearing the parties stipulated in open Court that the actions might be combined and tried as one, it being agreed that the issues in the two actions were practically the same.

The combined action was tried to the court sitting without a jury. The pleadings by the Company contained practically all the record facts involved in the controversy between the parties relative to the orders made by the Board and sundry hearings had before it. All the evidence adduced at the hearing before the trial court consisted of a brief examination of the counsel and chairman of the Board and the examination of the Vice-President and Manager of the Company. When both parties rested, the matter was submitted on briefs, and both parties later submitted proposed findings of fact and conclusions of law. The court made and entered its own findings of fact and conclusions of law, and made and entered its amended judgment, it having been found that the judgment first entered did not follow the [fol. 133] findings of fact and conclusions of law. By conclusion of law number 2 the court held that section 3847.16, Revised Codes, "is a valid exercise of legislative authority and should be obeyed." By the amended judgment the Company was restrained and enjoined from operating its motor vehicles over the highways of the state of Montana until it shall have paid the amounts due the state as demanded under section 3847.16, Revised Codes, as follows: for the year 1938, $250.00; for the year 1939, $400.00; for

the year 1940, $440.00, with interest on the respective amounts from the first day of January of each year mentioned until paid, with costs to the Board. It was "further ordered, adjudged and decreed that said Board be and it is enjoined and restrained from enforcing or applying against defendant any of the provisions of section 3847.27, Revised Codes of Montana, 1935, and in particular from exacting any of the fees and taxes therein specified." Both the Board and the Company appealed from that part of the judgment adverse to it. The effect of the judgment of the trial court is to overrule the Company's contention that section 3847.16 is invalid as in conflict with the commerce clause of the Federal Constitution, and the Constitution of Montana.

The effect of the trial court's order enjoining the Board from enforcing any of the provisions of section 3847.27, Revised Codes, is to relieve the Company from the obligation to comply with the Board's demand to pay the tax of one-half of one percent of its gross revenue or the minimum fee of $15.00 on each vehicle operated over the roads of the state.

Of the nine specifications of error assigned by the Company, the first is upon the court's overruling its demurrer to the complaint. The Company by its demurrer contends that as the Board is purely a creature of statute it has no power to sue; that by reason of the provisions of section [fol. 134] 3806, Revised Codes, the state is a necessary party to these actions. The Board of Railroad Commissioners is created and its powers enumerated by Chapter 309 of the Political Code, comprising sections numbered 3779 to 3847 inc., Revised Codes, and Chapter 310 as heretofore mentioned is the Motor Carriers Act. By section 3847.8 of the latter chapter the enforcement of the Motor Carriers Act is vested in the Board of Railroad Commissioners. It is true, as contended by the Company, that section 3806 provides actions to enforce the Board's regulations under the law shall be brought by the Attorney General in the name of the state, but section 3847.14 of the Motor Carriers Act provides in part, "Orders and final determinations of the board in all proceedings pursuant to the provisions of this act shall be enforced in the manner provided for the enforcement of orders of the board of railroad commissioners by the provisions of chapter 309 of the political code, and laws amendatory thereof. Pro-

vided, further, that if any motor carrier shall operate in violation of the provisions of this act, or shall fail or neglect to obey any lawful order of the board, *the board or any party injured may* apply to any court of competent jurisdiction, in any county where such motor carrier is engaged in business, for the enforcement of this act or such order; and the court shall enforce obedience thereto by writ of injunction, or other proper process, mandatory; or otherwise, and to restrain such carrier, its officers, agents, employees, or representatives from further violation of this act, or such order, or to enjoin upon it, or them, obedience to the same." We think this section must be construed along with section 3806, supra, and being a later enactment controls and modifies section 3806, and that the Board is authorized to maintain this action.

Specifications of error Nos. 2 and 3 are on alleged error [fol. 135] of the court in refusing to adopt the findings of fact and conclusions of law proposed by the Company. Such proposed findings and conclusions are predicated upon the contention that as the Company is engaged in interstate transportation only the legislative acts under which the Board asumes to enforce the exactions in the way of fees and taxes are acts which apply exclusively to motor carriers engaged solely in intrastate commerce. In this connection the Company contends that section 3847.16, Revised Codes, is null and void by reason of its conflict with the Fourteenth Amendment to the Constitution of the United States and with section 27 of Article III, the due process clause, of the Constitution of Montana, and it is further contended that the fes and licenses which the Board demands the Company shall pay may, under the statute, be used for other purposes than improvement and maintenance of the highways of the state, and that when such exactions in the way of taxes and licenses are imposed upon the Company for other purposes they become in effect exactions on interstate commerce and section 3847.16, Revised Codes, is therefore illegal and void as to the plaintiff, being in violation of Clause three of section 8, Article I of the Constitution, the commerce clause, of the United States.

Mr. Justice Brandeis, speaking for the court, clearly stated the rule applicable to the relative rights and power of the Federal Congress and state legislatures in regard to providing rules and regulations and imposing exactions in the way of fees, licenses and taxes on motor carriers in

the case of Interstate Transit, Incorporated v. Lindsey, 283 U. S. 183, 75 L. Ed. 953, a case arising under an act of the legislature of the state of Tennessee imposing a tax upon concerns operating interstate motor busses on the highways of the state. The controversy involved "a privilege tax [fol. 136] graduated according to carrying capacity." A tax of $500 a year was imposed upon each vehicle seating more than twenty and less than thirty passengers. The motor company made a quarterly payment under protest and brought suit to recover the amount paid on the ground that the statute applied violated the commerce clause of the Federal Constitution. The trial court allowed recovery, but its judgment was reversed by the Supreme Court of the state and the case was appealed to the Supreme Court of the United States as above indicated. Justice Brandeis said: "While a state may not lay a tax on the privilege of engaging in interstate commerce, Sprout v. South Bend, 277 U. S. 163, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. Kane v. New Jersey, 242 U. S. 160, 168-169; Clark v. Poor, 274 U. S. 554; Sprout v. South Bend, supra, pp. 169-170. As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, Interstate Busses Corp. v. Blodget, 276 U. S. 245, or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, supra, or otherwise where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick v. Maryland, 235 U. S. 610, 612; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252. Compare Interstate Busses Corp. v. Holyoke Street Ry., 273 U. S. 45, 51. * * *

[fol. 137] "The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting section 4 of the 1927 Act with those statutes which admit-

tedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon. The former declares specifically in connection with the privilege tax on interstate busses that the proceeds 'shall go and belong exclusively to the General Funds of the State.' On the other hand, in the legislation by which Tennessee has provided for defraying the cost of constructing and maintaining the state highways and regulating motor traffic, it has been the consistent practice to prescribe that moneys raised for this purpose shall be segregated and go into the Highway Fund. The present system of motor regulations was inaugurated in 1915. At the same session, the legislature created a State Highway Commission with power to construct and maintain highways. In these statutes and in many later ones—prescribing additional fees for the registration and licensing of motor vehicles, imposing gasoline taxes, laying a one mill road tax, and authorizing the issue of bonds for the construction of highways and bridges,—the legislature provided that the proceeds of the fees, taxes, and bonds, and of the tolls collected on bridges, should be set apart as state highway and bridge funds to be expended by the Commission exclusively for the construction and maintenance of highways or bridges. The absence in Section 4 of this provision, which characterizes almost every other Tennessee statute relating to the construction and maintenance of highways or the regulation of motor vehicle traffic, is additional evidence that the present tax was not exacted for such purposes, but merely as a privilege tax on the carrying on of interstate business. [fol. 138] "It is suggested that a tax on busses graduated according to carrying capacity is common and is a reasonable measure of compensation for use of the highways. It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce. Being free to levy occupation taxes, States may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways. Compare Gundling v. Chicago, 177 U. S. 183, 189. But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the

use made, or to be made, of the highways of the State. Clark v. Poor, supra. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

In an annotation in 135 A. L. R. 1358, it is said: "• • • it is well settled that in the absence of Federal legislation especially covering the subject, a state may prescribe regulations governing the use of motor vehicles on its highways, providing such regulations do not impose undue burdens on interstate commerce, and are reasonable and not discrimina- [fol. 139] tory."

In the case of South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177, 82 L. Ed. 734, the question of the right of the state to restrict the width of motor vehicles operated on the state highways and the gross load carried, was involved. Mr. Justice Stone, speaking for the court, said: "Ever since Willson v. Black Bird Creek Marsh Co., 2 Pet. 245, and Cooley v. Board of Port Wardens, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints.

"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant

burdens on those without the state. Robbins v. Shelby County Taxing District, 120 U. S. 489, 498; Caldwell v. North Carolina, 187 U. S. 622, 626. It was to end these practices that the commerce clause was adopted. See Gibbons v. Ogden, 9 Wheat. 1, 187; Brown v. Maryland, 12 Wheat. 419, 438-439; Cooley v. Board of Port Wardens, supra; State Freight Tax, 15 Wall. 232, 280; State Tax on Railway Gross Receipts, 15 Wall. 284, 289, 297-298; Cook v. Pennsylvania, 97 U. S. 566, 574; Maine v. Grand Trunk R. Co., 142 U. S. 217; Baldwin v. Seelig, 294 U. S. 511, 522; 11 [fol. 140] Farrand * * *. Few subjects of state regulation are so peculiarly of local concern as is the use of the highways. * * * Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse. * * *

"The nature of the authority of the state over its own highways has often been pointed out by this Court. It may not, under the guise of regulation, discriminate against interstate commerce. But 'In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' Morris v. Duby, 274 U. S. 135, 143. This formulation has been repeatedly affirmed. Clark v. Poor, 274 U. S. 554, 557; Sprout v. South Bend, 277 U. S. 163, 169; Sproles v. Binford, 286 U. S. 374, 389, 390; cf. Morf v. Bingaman, 298 U. S. 407, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. * * * Restrictions favoring passenger traffic over the carriage of interstate merchandise by truck have been similarly sustained, Sproles v. Binford, supra; Bradley v. Public Utilities Comm'n, 289 U. S. 92, as has the exaction of a reasonable fee for the use of the highways. Hendrick v. Maryland,

[fol. 141] 235 U. S. 610; Kane v. New Jersey, 242 U. S. 160; Interstate Busses Corp. v. Blodgett, 276 U. S. 245; Morf v. Bingaman, supra; cf. Ingles v. Morf, 300 U. S. 290.

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states. . . .

"When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. Jacobson v. Massachusetts, 197 U. S. 11, 30; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365; Price v. Illinois, 238 U. S. 446, 451; Hadacheck v. Sebastian, 239 U. S. 394, 408-414; Thomas Cusack Co. v. Chicago, 242 U. S. 526, 530; Euclid v. Ambler Realty Co., 272 U. S. 365, 388; Zahn v. Board of Public Works, 274 U. S. 325, 328; Standard Oil Co. v. Marysville, 279 U. S. 582, 584. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. 'It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. Morris v. Duby, supra, 143; Sproles v. Binford, supra, 389, 390; Minnesota Rate Cases, supra, 399, 400; Smith v. St. Louis & S. W. R. Co., 181 U. S. 248, 257; Reid v. Colorado, 187 U. S. 137, 152; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 42, 43."

The foregoing authorities clearly establish the right of the state to impose upon motor carriers engaged in inter-[fol. 142] state commerce exactions by way of taxes and licenses for use by such motor carriers of the state highways when such exactions are necessary to build, maintain, and supervise the highways. In addition the exactions must be such as are reasonably necessary for the purposes mentioned, and must not be discriminatory as between state and interstate carriers. It further appears to be the established rule of the federal courts to require the interstate carrier who challenges the right of the state to impose such licenses and taxes to affirmatively show that the exactions

demanded are not necessary for the purposes mentioned or are discriminatory. In other words the burden is on the carrier to show wherein the exactions are unlawful as to him.

Adverting to the contention of the company that section 3847.27 is invalid, the trial court having so held, the Board contends the court's holding was erroneous.

The company's position is that as section 3847.23, Revised Codes, provides in part that it shall not be necessary for an interstate motor carrier to make any showing of public convenience and necessity in order to obtain a permit to operate in Montana, that it therefore necessarily follows that the company being an interstate carrier section 3847.27 does not apply to it, but only to intrastate carriers. To the contention that the Motor Carriers Act does not apply to the company, we do not agree. The Act was obviously intended to apply to all motor carriers operating over the highways of the state. See section 3847.1 (h) and 3847.16, Revised Codes. It clearly appears that the legislature was aware of decisions of the Supreme Court of the United States with which the Act might conflict and endeavored to have the Act so drawn as to meet such a situation. By section 3847.24 of the Act provision is made by which if any part or provision is found to be unconstitutional it shall [fol. 143] not affect the validity of the balance of the Act. Certain parts of section 3847.23, supra, were obviously incorporated in the Act for the same purpose, particularly that part of such section which provides that it shall be unnecessary for any interstate motor carrier to make any showing of public convenience and necessity in order to obtain a state permit. However, elimination of the part of section 3847.23 to which we have just referred does not abate the tax imposed by section 3847.27, Revised Codes. The company in support of its contention that Chapter 310 was designated to control intrastate motor carriers only, cites Buck v. Kuykendall, 267 U. S. 307, and Bush & Sons Company v. Maloy, 267 U. S. 317; twin cases, the opinion in both being delivered by Mr. Justice Brandeis. Both were rendered in January, 1925, and the Motor Carriers Act was not enacted until 1931, six years later.

In the first case Buck desired to operate an auto stage line for hire between Portland, Oregon, and Seattle, Washington. Oregon granted Buck a certificate of public convenience and necessity, but the state of Washington refused

such a certificate. When the case in the course of litigation reached the Supreme Court of the United States, it was held that "the Washington statute is a regulation, not of the use of its highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it." That conclusion was predicated upon the proposition that the "primary purpose (of the statute requiring such a certificate) is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to [fol. 144] others for the same purpose and in the same manner." The decision in the Bush case was practically to the same effect and on similar facts. It is obvious that the two decisions were based upon the ground of unlawful discrimination. There is no showing of discrimination in the case at bar. All motor carriers are made subject to the same regulations, under our Motor Carriers Act.

The trial court held in the case at bar, "That section 3847.27, Revised Codes of Montana, 1935, as applied to the defendant is invalid for the reason that it fails to specify any method by which the gross operating revenue of the defendant in the state of Montana for any year may be determined, and for the further reason that the Public Service Commission of the state of Montana mentioned as the administrative body in sections 3847.26, 3847.27 and 3847.28, Revised Codes of Montana 1935, has nothing to do with the regulation and supervision of motor carriers using the public highways of the State of Montana."

On the question of the constitutionality of section 3847.27, this court said in the case of State v. Stark, 100 Mont. 365, 52 Pac. (2d) 890, that, "In determining whether an Act of the legislative assembly is invalid or not, it has long been the established rule of this court that the constitutionality of any Act shall be upheld if it is possible to do so (State ex rel. Tipton v. Erickson, 93 Mont. 466, 19 Pac. (2d) 227; Hale v. County Treasurer, 82 Mont. 98, 105, 265 Pac. 6), and that a statute 'is prima facie presumed' to be constitutional, and all doubts will be resolved in favor of its validity. (State ex rel. Toomey v. Board of Examiners, 74 Mont. 1, 238 Pac. 316, 320.) The invalidity of a statute must be shown beyond a reasonable doubt before this court will declare it to be unconstitutional. (Herrin v. Erickson,

90 Mont. 259, 2 Pac. (2d) 296.) And a statute will not be [fol. 145] held unconstitutional unless its violation of the fundamental law is clear and palpable. (Hill v. Rae, 52 Mont. 378, 158 Pac. 826, Ann. Cas. 1917E, 210, L. R. A. 1917A, 495.)"

By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, State v. Bowker, 63 Mont. 1, 205 Pac. 961, it becomes clear that the clause in section 3847.27 imposing upon the company a tax of one-half of one per cent. based upon its "gross operating revenue" that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16 which is as follows:

"When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state."

"The legislative intention • • • is controlling." State v. Smith, 57 Mont. 563, 574, 190 Pac. 107, and cases cited. There could have been but one purpose in incorporating paragraph (b) in section 3847.16, namely, to ascertain the gross revenue derived by the company's operations in Montana in order to use that as a basis for the levy of the tax of one-half of one per cent.

It was said in United States v. Freeman, 3 Howard 565, (44 U. S. 548), "A thing which is within the intention of [fol. 146] the makers of the statute, is as much within the statute as if it were in the letter." Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree, no difficulty would arise in putting into effect the minimum fee of $15.00 required for each company vehicle operated within the state.

Furthermore, in this connection it is our opinion that when the legislature enacts a statute imposing the duty of enforcement of such statute upon a particular board or officer of the state but fails or neglects to clearly prescribe and incorporate in the Act the mode of enforcement, that such officer or board may adopt any fair and reasonable mode of enforcement designed to effectuate the purposes of the Act. In other words, when a duty is imposed upon a particular officer or board in express terms such other duties are implied as are necessary to carry into effect those that are expressed.

Such, we think, is the effect of the rule laid down in the case of Morse v. Granite County, 44 Mont. 78, 119 Pac. 286, and followed in Fisher v. Stillwater County, 81 Mont. 31, 261 Pac. 607; Arnold v. Custer County, 83 Mont. 130, 269 Pac. 396, and State v. Stark, 100 Mont. 365, 52 Pac. (2d) 890.

We do not agree with the trial court that the Public Service Commission "has nothing to do with the regulation and super-vision of motor carriers using the public highways." The functions and duties of the Board relative to railroads, motor carriers, common carriers of oil, the inspection of boats and supervision of navigation, and public utilities, are closely related and the administration of the whole is upon a Board composed of the same three persons, and by reference many of the rules and regulations ex- [fol. 147] pressly applicable to one are also made applicable to another. The accounts and finances relating to each of these legislative Acts must of course be kept separate and distinct, but all are under the same management and we see no sound reason why the same overall board, while convened for the purpose of dealing with some railroad problem, may not at the same time dispose of questions relating to motor carriers or any other duty imposed upon the Board. The necessity of having minutes of such meetings kept separately as to the particular things done does not affect the powers of the Board to dispose of, at the same time, other duties coming under its supervision.

The terms "Board of Railroad Commissioners" and "Public Service Commission" are used interchangeably and we think it was the legislative intent by section 3847.27 to use the words "Public Service Commission" as including the "Board of Railroad Commissioners." If this were not so, then section 3847.27 would have no meaning whatsoever,

since strictly speaking the Public Service Commission does not issue certificates of public convenience and necessity.

The company contends that in fixing the exactions imposed upon it, no distinction is made between large and small vehicles, or heavy and light loads, nor the number of miles travelled over the highways. There is merit in this contention. The heavier the load and the greater the number of miles travelled the greater the wear and tear on the roadway. It is obvious that the tax set up in section 3847.27 was for the purpose of meeting this situation. A short trip and a light load would bring the carrier but little revenue whereas the heavier traffic and longer hauls would produce more revenue and require more taxes. Some discrimination may arise from the tax but in that respect we refer to what was said in Hilger v. Moore, supra, where [fol. 148] at page 176 we find in the case of Travelers' Ins. Co. v. Connecticut, 185 U. S. 364, 371, 46 L. Ed. 949, 22 Sup. Ct. Rep. 673, 676, this rule applied:

"But, further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents."

Again it is contended that revenue is demanded from the Company to be used to pay salaries of the Board members and for other alleged unlawful purposes. We think a full and complete answer to all such contentions is found in the case of Clark v. Poor, 274 U. S. 554, at pages 556-557, where Mr. Justice Brandeis, speaking for the court, said: "The plaintiffs claim that, as applied to them, the Act violates the commerce clause of the Federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the State; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose,

in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, * * * for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate com- [fol. 149] merce, are subject to regulation by the State to ensure safety and convenience and the conservation of the highways. Morris v. Duby, ante, [271 U. S. 135] p. 135; Hess v. Pawloski, ante, [274 U. S. 352] p. 352. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. Hendrick v. Maryland, 235 U. S. 610; Kane v. New Jersey, 242 U. S. 160. Compare Packard v. Banton, 264 U. S. 140, 144.

"There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce. It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." To the same effect is Dixie Ohio Express Co. v. State Revenue Comm. of Georgia, 306 U. S. 72, 83 L. Ed. 495.

In differentiating between the numerous decisions of the United States Supreme Court wherein questions involving interstate commerce were considered and determined it is important to keep in mind that actions involving the use of state highways for the purposes of interstate commerce have no relation to actions relating to railroads, telephone or telegraph lines, sleeping car or freight line owners, where all such facilities are owned by the particular public utility, and motor carriers operating over highways owned by the state. In the case at bar Montana owns the highways over which the company operates [fol. 150] its vehicles and the taxes imposed are for the use

of the state highways. The revenue collected is devoted to the building, repairing and policing of such highways, and that which the state furnishes is an aid, not a burden to interstate commerce.

The judgment of the lower court in restraining the Company from operating its vehicles over the highways of Montana until it shall have paid the exactions imposed pursuant to section 3847.16, Revised Codes, as set out in such judgment, is affirmed. As to the order of the lower court restraining the Board from enforcing the exactions imposed upon the Company by section 3847.27, Revised Codes, the cause is remanded with instructions to vacate and set aside such order, and enter judgment in favor of the Board in accordance with this opinion.

C. F. Morris, Associate Justice.

We concurr:

Carl Lindquist, Chief Justice; Hugh R. Adair, Albert H. Angstman, Associate Justices.

[fol. 151] Mr. Justice Cheadle:

Because of lack of time to study the foregoing decision, due to recess by the court, I reserve my opinion with the understanding that it shall become a part of the foregoing, or a dissent thereto.

Edwin K. Cheadle, Associate Justice.

[File endorsement omitted]

In Supreme Court of Montana

Dissenting Opinion—Filed September 19, 1946

Mr. Justice Cheadle dissenting:

The majority opinion is based upon and attempted to be supported by the fallacious premise that the exactions in question "are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways." I can find no support for any such presumption. I fully appreciate the problem of maintaining our highways, and the necessity of exacting a fair

compensation for their use by foreign-owned trucks, but I cannot, as a matter of expediency, lend my support to the exaction of such compensation by judicial edict.

Section 3847.27, Revised Codes, provides: "In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, ever- motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall * * * file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of [fol. 152] operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars ($30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars ($15.00)."

Section 3847.28 provides: "All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. * * *" Disposition of this fund is directed by section 3847.17, as follows: "Such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the business herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the 'motor carrier fund.' * * *"

Since the defendant company is engaged solely in interstate commerce, three questions involving the interpretation of the quoted sections immediately present themselves, viz:

1. Does section 3847.27 include only motor carriers holding a certificate of public convenience and necessity, or does it contemplate all motor carriers? Section 3847.23 contains the provision "that it shall not be necessary for any interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing

of public convenience and necessity, except as to the transportation of passengers and/or freight between points [fol. 153] within this state * * *." It would seem that the wording of section 3847.27 restricts the operation of that section to motor carriers to those holding certificates of public convenience and necessity. The defendant company, being engaged only in interstate commerce, is not included within such class.

2. In computing the amount of the exaction prescribed by section 3847.27 (one-half of one per cent of the amount of the gross operating revenue), what is to be the measure of the gross operating revenue of the carrier employed only in interstate commerce? Is it to be based upon the proportionate mileage travelled over Montana highways of the aggregate distance travelled by the vehicle? Or shall it be calculated upon the gross revenue of the carrier from all sources? If the provisions of this section were intended to include interstate motor carriers, it is apparent that the gross operating revenue, from whatever source, must be the yardstick of the exaction. Such an exaction would be so manifestly unfair, discriminatory and unreasonable as to impel the conclusion that the legislature did not intend the inclusion of strictly interstate carriers. It is urged that the practice of the plaintiff board has been to exact only the minimum fee prescribed. But such is only a minimum, and is not an alternative exaction; and the test to be applied, of course, is what might be done under the statute, not what has been done.

3. Does the purpose for which the tax is collected and applied constitute an interference with and a burden upon interstate commerce, prohibited by the federal Constitution and statutes, as defined by the Supreme Court of the United States? The majority opinion quotes extensively from the leading case of Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 75 L. Ed. 953. But it would seem to me that the [fol. 154] holding of that case refutes rather than supports the conclusion arrived at here. As quoted in the majority opinion, Justice Brandeis in his opinion said: "While a state may not lay a tax on the privilege of engaging in interstate commerce, Sprout v. South Bend, 277 U. S. 163, it may impose upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the

cost of constructing and maintaining them and of regulating the traffic thereon. * * * As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, * * * or by the express allocation of the proceeds of the tax to highway purposes, * * * or otherwise where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. * * *

"Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard as to whether the charge imposed represents merely a fair compensation for the use of their highways. * * * But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charges must be necessarily predicated upon the use made, or to be made, of the highways of the state. * * * In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even [fol. 155] with the number of passengers caried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

For two reasons, then, it is apparent that the imposition in question is not, and was not intended to be, exacted as compensation for use of state highways by interstate motor carriers. First, the act specifically provides that the funds derived shall be used for defraying the expenses of the board of Railroad Commissioners in administering the Motor Carriers Act. This court will take judicial notice of the fact that the building and maintenance of state high-

ways, and regulation of traffic thereon, is a function of the state highway department, and entirely foreign to the prescribed functions and powers of the Railroad Commission. Secondly, the amount and character of the attempted imposition bear no relation to the only purpose for which such imposition would be valid, that is, as compensation for use of the state highways. And this is so no matter which method is applied in determining the gross operating revenue. As in the Lindsey case, this exaction is proportioned only to the earnings of the vehicle. I think there can be no question but that the state has power, by appropriate legislation, to require compensation for the use of its highways by vehicles, engaged in interstate commerce. I further think that such legislation must emanate from the legislative arm of the state government. This court may, perhaps, point out that the state is overlooking a possible [fol. 156] source of revenue for the maintenance of its highways, but may not enact the legislation for the purpose of its collection, under the guise of judicial interpretation.

Edwin K. Cheadle, Associate Justice.

[fol. 157] IN THE SUPREME COURT OF MONTANA

JUDGMENT ENTERED IN MINUTE BOOK—June 29, 1946

This cause this day came on regularly for judgment and decision, whereupon, on consideration, it is hereby ordered and adjudged that the judgment of the court below entered on the 31st day of August, 1945, pertaining to section 3847.16, Revised Codes, is affirmed and the judgment of the same date pertaining to section 3847.27, Revised Codes, is remanded with directions to vacate and set aside such judgment, and enter judgment in favor of the Board. Opinion by Associate Justice Morris, Chief Justice Lindquist and Associate Justices Adair and Angstman concurring. Associate Justice Cheadle reserves the right to concur or dissent.

IN THE SUPREME COURT OF MONTANA

ORDER DENYING PETITION FOR REHEARING ENTERED IN MINUTE BOOK—September 19, 1946

It is hereby ordered that the dissenting opinion [Associate Justice Cheadle] in the above cause submitted this date be attached to and filed with the majority opinion therein.

Done this 19th day of September, 1946, Carl Lindquist, Chief Justice, C. F. Morris, Hugh R. Adair, Albert Angstman and E. K. Cheadle, Associate Justices.

It is further ordered that the petition for rehearing in the above entitled cause be denied.

Done this 19th day of September, 1946, Carl Lindquist, Chief Justice, C. F. Morris, Hugh R. Adair and Albert Angstman, Associate Justices.

[Vol. 158] [File endorsement omitted]

IN THE SUPREME COURT OF MONTANA

[Title omitted]

PETITION BY AERO MAYFLOWER TRANSIT COMPANY FOR REHEARING—Filed July 8, 1946

Comes now Aero Mayflower Transit Company, Respondent on the Appeal of the Board of Railroad Commissioners herein, and Appellant on the Cross-Appeal of Aero Mayflower Transit Company herein, and repectfully petitions for a rehearing en banc of all the issues on appeal before this Honorable Court, upon the following grounds:

(I) That a fact, material to the decision, was overlooked by the Court;

(II) That a question decisive of the case submitted by counsel was overlooked by the Court;

(III) That the decision is in conflict with an express statute to which the attention of the Court was not directed.

(IV) That the decision is in conflict with a controlling decision to which the attention of the Court was not directed.

This Court, like all Courts operating in the Anglo-American tradition of a government of law and not a government of men, expressly recognizes that its opinions, expressions and decisions are not infallible. For that reason, and, also, because it desires the aid of litigants and counsel in the production of opinions resting on the integrity of reasoned internal structure, this Court has by its own rules, provided for rehearings, and petitions for rehearings in every case coming within its Rule XV. In the spirit of that rule the undersigned counsel files and presents this Petition for Rehearing, confident that this Court is desirous of withholding from the Montana Reports any expression or decision which is freighted with its own internal contradictions and misstatements of fact, as well as law, and which denies effect to the Federal Constitution.

Desirable as it may be for the Legislature to impose on an interstate motor carrier some form of taxation, constitutional in substance and effect, by way of compensation for the use of the highways of Montana, *it simply is not the business* of the judiciary to supply the imposition, and the absence of proper legislative action confers no such authority on the judiciary, nor do erroneous statements of fact or law supply such authority. The vice of the opinion, as counsel understands it, is that the Court under the mandate to uphold legislative enactments misreads that mandate to mean that *the court is required to supply legislative deficiencies*, i.e., the bricks of the wall, and not the judicial mortar of construction. And in supplying judicial mortar, the straw of erroneous factual assumptions corrupt the mass.

These appeals come to this Court after long, serious [fol. 160] and patient judicial review by the trial judge. Certainly, he was just as anxious "to vindicate the constitutionality of the statutes" as this Court. *He could not sustain the tax* on the gross revenue of the interstate operator from interstate operations only because it was a privilege tax merely, a tax on the bare privilege of carrying on interstate commerce, in violation of the Federal Constitution. He refused, by judicial amendments to legislate where the legislature had not done so, i.e., relate it to compensation for use of the highways, or to defray the expense of regulating motor traffic. And we submit that

nothing in this Court's opinion of June 29, 1946, overcomes or challenges the soundness of that conclusion. We first advert to the internal construction of the opinion.

A

Argument (Points 1 to 4 of Petition, inclusive)

UNTRUE AND INCORRECT STATEMENTS IN THE OPINION VITIATING ITS RATIONALE

Every lawyer practicing before this Court owes to the Court the duty of pointing out untrue, incorrect or erroneous statements of fact or of law, or both, in the opinions emanating from the Court. This duty should be discharged by members of the bar irrespective of whether they are counsel in a given action. A fortiori, when they are counsel, and such erroneous statements are foundation material for erroneous conclusions.

(a) In the first paragraph of the opinion it is said:

> "This controversy involves the question as to what extent a state may impose burdens in the way of licenses and taxes upon motor carriers engaged in interstate commerce for operating their vehicles over the highways of the state. Such exactions are imposed upon the presumption that the state owns the highways within its borders and the exactions are [fol. 161] imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways."

Passing over the fact that the carrier here is engaged *solely* in interstate commerce (as found in Par. 3 of the opinion) the statement that the taxes are exacted as compensation for the use of the highways,

> *"and the revenue derived therefrom shall be expended to build, maintain and supervise such highways,"*

is not true as to the quoted words.

Sections 3847.16, 3847.17 and 3847.27 covering both the $10.00 flat per vehicle tax and the ½ of 1 per cent gross revenue tax, *pass the tax to the motor carrier fund* which

> "shall be available for the purpose of defraying the expenses of administration of this Act (the Motor

Carrier Act)" and the regulation of the businesses herein described" (*Parenthesis our-.)

Not one cent goes to build any Montana highway.
Not one cent goes to maintain any Montana highway.
Not one cent goes to supervise any Montana highway.

Surely, the Court does not desire such erroneous statements to stand. And yet they are the very foundation—the rationale—of the opinion, for that error is repeated again and again in the opinion, viz.,

In Paragraph 19, page 13, it is said:

> "The foregoing authorities clearly establish the right of the state to impose upon motor carriers engaged in interstate commerce exactions by way of taxes and license *for use by such motor carriers of the state highways when such exactions are necessary to build, maintain, and supervise the highways.* In addition the exactions must be such as are reasonably necessary for the purposes mentioned, and must not be discriminatory as between state and interstate carriers.

In the next to the last paragraph of the opinion, page 21, it is said:

> [fol. 162] "In the case at bar Montana owns the highways over which the company operates its vehicles and the taxes imposed are for the use of the state highways. The revenue collected is devoted to the building, repairing and policing of such highways, and that which the state furnishes is an aid, not a burden to interstate commerce."

The Board of Railroad Commissioners in this case never made any contention that the revenues from these license taxes were to be used for *building, maintaining or supervising highways.* The Board could not do so, and claim the fees. The revenue is for *"the expenses of administration of this act* (Motor Carrier Act) *and the regulation of the businesses herein described," a far different purpose than highway building, repair and supervision.*

During the argument in open Court, it was made clear that the revenues from the taxes in question were not levied for, or in fact used for, or divested to highway construction, maintenance, repair and supervision. (And so, too, the Brief of Aero in this case. Appellant Aero pages 51, et seq.)

Thus, it is seen that the opinion begins and concludes on the erroneous statement that the revenues from these taxes are for highway building, repair and supervision. Surely, the Court will recall, on reading this petition, that revenues for highway building, repair and supervision come only from gasoline license taxes in Montana collected by the State Board of Equalization and administered by the Montana Highway Commission, and that the Board of Railroad Commissioners has nothing to do with such exactions.

The idea that these revenues attempted to be exacted from Aero are for highway construction, maintenance, repair and supervision, is so firmly fixed in the court's minds, [fol. 163] apparently, that the opinion cites Interstate Transit vs. Lindsey, 283 U. S. 183, 75 L. Ed. 953, in support of its reasoning. But in that case, Mr. Justice Brandeis, writing for the United States Supreme Court, *invalidated a Tennessee statute for the very reason that the tax* "was not," in the court's words, "exacted for such purposes," i.e., construction or maintenance of highways or bridges, "but merely as a privilege tax on the carrying on of interstate business." The Justice pointed out that in Tennessee, as in Montana, the revenues for highways came from other taxes. The case is a plain, unassailable authority for Judge Lynch's opinion. And yet the opinion in this case (Par. 19, page 13) uses it as authority to bolster the erroneous assumption that the Montana licenses are to build, maintain and supervise highways.

(b) Another statement, at once incorrect and misleading, is found in Paragraph 5 of the opinion, where it is stated: (Page 3)

> "It appears that the Board has heretofore and for some years collected two separate exactions from the Company: The Registration License Tax authorized by sections 1760-1760.10, Revised Codes; and the tax on sales of gasoline, authorized by sections 2381.1 to 2396.9, Revised Codes."

Surely this Court does not desire to represent that the Board of Railroad Commissioners collects either,

(a) the registration fees collected by the Registrar of Motor Vehicles (Sections 1760-1760.10, R.C.M. 1935); or

(b) the gasoline license tax collected by the State Board of Equalization. (Sec. 2381.1-2396.9, R.C.M. 1935.)

What purpose can be subserved by the inclusion of this erroneous statement? Surely, the first erroneous utterance can not be bolstered by a second. The Board of Railroad Commissioners makes no claim to collect these taxes. [fol. 164] These incorrect statements show very clearly the necessity for a rehearing in this action, for these factual errors make manifest that whatever the cause, the basic, material facts in the case remain obscure to the Court. And where the basic facts remain obscure, the legal conclusions are without foundation. If counsel for appellant Aero is in any way responsible for such errors, he now apologizes to the Court. But, upon rereading Aero's briefs, he does not find any such misstatements in the briefs.

B

The Internal Contradictions Vitiating the Opinion as Respects the Gross Revenue Tax

(a) In Paragraph 3, page 2 of the opinion, this Court clearly states the undisputed and indisputable fact that the operations of Aero Mayflower Transit Company *are wholly interstate.* The opinion says:

> "There is no dispute as to the facts. The Company is engaged in the motor transportation of used or second hand household goods and office furniture from one state to another for hire. It does not transport any goods of any nature or kind from one point to another in the same state. *The only transportation it engages in, so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state.*"

In paragraph 25, page 17, of the opinion, the opinion states:

> "By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, State v. Bowker, 63 Mont. 1, 205 Pac. 961, it becomes clear

that the clause in section 3847.27 imposing upon the company a tax of one half of one percent. based upon its 'gross operating revenue' that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16 which is as follows:

[fol. 165] 'When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.' ''

In paragraph 26, page 18 of the opinion, it is stated:

"It was said in United States v. Freeman, 3 Howard 565, (44 U. S. 548), 'A thing which is within the intention of the makers of the statute, is as much within the statute as if it were in the letter.' Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree, *no difficulty would arise in putting into effect the minimum fee of $15.00 required for each company vehicle operated within the state.*"

Thus the opinion, in one breath finds Aero's operations interstate only, and then in the next breath says that irrespective of that fact, Aero is liable for a minimum of a $15.00 fee, even though it receives no revenue in Montana, and it would be liable for such excess over $15.00 as the Commission might arbitrarily undertake to impose, even though it did no business at all in Montana. If there must first be revenue from an operation in Montana before any part of this statute is applicable to the Aero Mayflower Transit Company, (and the undisputed fact is that it does

no business in Montana,) *then the imposition of a minimum of $15.00 for revenue tax becomes a privilege tax and nothing else.* That is a wholly inconsistent attitude and should be corrected by our Supreme Court.

In other words, *we submit that this Court must agree with the words of the statute and with both Aero and the Board in its interpretation that the tax under Section 3847.27 is a tax on gross operating revenue—without revenue there* [fol. 166] *can be no tax at all, for the legislature has laid the tax on revenue.* The $15.00 is not another flat per vehicle tax; (supplied by Section 3847.16) it is the minimum tax only when gross operating revenue is present, according to the court's language (Par. 25, page 17 of opinion) "the gross revenue derived by the company's operations in Montana." Now, since there are no operations in Montana, as the opinion concedes (Par. 3, page 2 of opinion) $15.00 may not be taken from the operator just because it is easy to say "Give us $15.00." The error in the opinion stems from the fact that the Court confuses the $15.00 minimum exaction under a gross revenue tax *where revenue is present,* a mill, a cent, a dollar, or more, with a fee for operating a vehicle in the State, regardless of revenue from the operation. *The $15.00 is not a fee for operating a vehicle;* it is a minimum fee upon gross revenues when ½ of 1% of gross revenues do not amount to the sum of $15.00. Operating fees are covered by the Registration License Tax administered by the Registrar of Motor Vehicles, by the Gasoline License Tax administered by the State Board of Equalization, and by Section 3847.16, imposing the flat $10.00 fee "for every motor vehicle *operated*" by a motor carrier "over or upon the public highways of this State." Surely the Court will correct its opinion in this respect. It will not assume to hold the $15.00 minimum of the gross revenue tax, a flat per vehicle operating tax. There must be revenue before any part of that tax is collectible.

The Court cites Justice Brandeis' language in Interstate Transit, Incorporated vs. Lindsey, 283 U. S. 183, 75 L. Ed. 953, wherein he said:

> "While a state may not lay a tax on the privilege of engaging in interstate commerce," • • •

[fol. 167] but ignores that fundamental prohibition, by upholding as a tax on revenue from interstate commerce, a

$15.00 exaction when there is no revenue from operations in Montana, and orders the wholly interstate operations of Aero to cease *if Aero does not pay $15.00 from Montana revenues when there are no Montana revenues.* By such a ruling, Montana can effectually arrest and stop all interstate commerce across its borders.

Another misconception, related to the failure to grasp the true meaning of the $15.00 minimum is found in Par. 8 of the opinion, where the Court says:

> "The effect of the trial court's order enjoining the Board from enforcing any of the provisions of section 3847.27, Revised Codes, is to relieve the Company from the obligation to comply with the Board's demand to pay the tax of one-half of one percent of its gross revenue *or* the minimum fee of $15.00 on each vehicle operated over the roads of the state." (Italics ours.)

The tax under Section 3847.27 is not in the alternative, i. e., ½ of 1 per cent of gross revenue, *or* $15.00 per vehicle operated; the $15.00 is a proviso whereby a minimum in that amount is fixed if the application of the percentage factor does not produce more than $14.9999.

We have demonstrated above that two facts material to the decision were overlooked by the Court in that no account of them was taken in final conclusion, i. e.,

(1) That no part of the (a) $10.00 per vehicle flat fee, or (b) the gross revenue fee is destined for, or used for, the construction, maintenance, repair or supervision of the highway; and

(2) That Aero has no revenues from any "operations in Montana" for it operates in interstate commerce only.

Referring again to the *second ground for rehearing, the question decisive of the case submitted by counsel, over-*[fol. 168] *looked by the court, is that the statute does not supply, the Board has not assumed to supply, and this Court does not supply, in its opinion, any yardstick whatever to "ascertain the gross revenue derived by the company's operations in Montana," which, the opinion says, is to be used "as a basis for the levy of the tax of one-half of one per cent."*

What the opinion does not do, and what it does, as respects the gross revenue tax, is this:

It does not mention, or address itself to, or in any manner attempt to dispose of these cases from the Supreme Court of the United States, holding that the State may not tax interstate commerce as such, the right to engage in interstate commerce, or the gross receipts of purely interstate commerce transactions, viz.:

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 82 L. ed. 1365;
Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015;
Fargo v. Michigan (Fargo v. Stevens), 121 U. S. 230, 30 L. ed. 888, 7 S. Ct. 857, 1 Inters. Com. Rep. 51;
Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308;
Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638;
Meyer v. Wells, F. & Co., 223 U. S. 298, 56 L. ed. 445, 32 S. Ct. 218;
Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18;
Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126;
United States Glue Co. v. Oak Creek, 247 U. S. 321, 328, 62 L. ed. 1135, 1141, 38 S. Ct. 499, Ann. Cas. 1918E, 748;
New Jersey Bell Teleph. Co. v. State Bd. of Texas and Assessments, 280 U. S. 338, 349, 74 L. ed. 463, 469, 50 S. Ct. 111;
Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 297 U. S. 650, 655, 80 L. ed. 956, 959, 56 S. Ct. 608;
[fol. 169] Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90, ante, 64, 58 S. Ct. 72;
Western Live Stock v. Bureau of Revenue, No. 322, October Term, 1937 (303 U. S. 250, ante, 823, 58 S. Ct. 546, 115 A. L. R. 944).

It *ignores* the decision of the Supreme Court of the United States uttered by Mr. Justice Hughes in a unani-

mous opinion, condemning a Montana tax on all business, interstate and intrastate, of a telephone company in

Cooney v. Mountain States Telephone and Telegraph Co., 79 L. Ed. 934.

The opinion ignores the long line of cases from this Court, the Supreme Court of Montana, recognizing and enforcing the above principles, *in cases dealing with interstate commerce, cases directly in point.*

State v. Great Northern Railway Co., 14 Mont. 381, 36 Pac. 458;

State v. Northern Pacific Express Co., 27 Mont. 419, 71 Pac. 404;

State v. Western Union Telegraph Co., 43 Mont. 445, 117 Pac. 93;

C. M. & St. P. Ry. Co. v. Swindlehurst, 47 Mont. 119, 130 Pac. 966;

J. I. Case Threshing Machine Co. v. Stewart, 60 Mont. 380, 199 Pac. 909;

C. M. St. P. & P. RR. v. Harmon, 89 Mont. 1, 295 Pac. 762;

Interstate Transit Co. v. Derr, 71 Mont. 222, 228 Pac. 624;

State v. Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301;

Fruitgrowers Express Co. v. Brett, 94 Mont. 281, 22 Pac. (2d) 171.

These holdings are in no manner affected by the fact that the commerce moves by rail instead of by truck. And the Derr case dealt with interstate movement by truck.

The opinion does, sub silentio, confess the weight of those cases, however, *for it pares down* Section 3847.27, the gross [fol. 170] revenue tax statute, which in terms applies to,

> "the gross operating revenue of such carrier for the preceding three months of operation," etc. (Page 5)

to mean,

> "the gross revenue derived from operations in Montana," (Page 17)

and by reference to sub-paragraph (b) of Section 3847.16, to mean,

> "the gross revenue derived by the company's operations in Montana in order to use that as a basis for the levy of the tax of one-half of one per cent." (Page 17)

The *opinion does*, in substance, admit that this construction is a judicial gratuity, and unwarranted as such, for it says,

> "Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree," etc., and then proceeds to excuse the omission by saying "no difficulty" arises with reference to the $15.00 minimum.

The minimum is merely the tail, not the hide.

Let us take the Court at its word and test the basis so found. Let us remember that the only transportation Aero engages in, as the opinion says, (Paragraph 3, page 2):

> ". . . so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state."

The service may be paid for by consignor, by consignee, or by some third person. *Not one dollar of the payment may come from any source in Montana.* What is the business done in Montana? The Court says it is *transportation*, i. e., the movement of goods in a motor vehicle over the highways of the state.

(a) Where no dollar is received in Montana, what is the basis of apportionment of Aero's gross revenues, received [fol. 171] outside of Montana?

On Montana mileage against system mileage?

On mileage with load?

On mileage without load?

On a per vehicle basis? Loaded vehicles only? Or all vehicles loaded or empty?

(b) If a consignor or consignee in Montana pays for the interstate service, what is the basis of the apportionment of gross revenues?

The dollars originating in Montana against system gross dollars?

Weighted by any factor of highways use?

Weighted by any factor of mileage?

(c) What relation is there between "the gross revenue derived from operations in Montana," as the Court says, and "transportation" in Montana?

Who is to determine the basis of apportionment? The Board? *The legislature did not say so. The legislature did not say that the Board could select any method it pleases. The legislature did not say this Court could select the method.* The legislature simply failed to provide a method and, accordingly, a workable law for gross revenue apportionment, assuming that it could within the Federal Constitution.

The opinion really recognizes this condition, and in final analysis attempts to excuse it in this language:

> *"Furthermore; in this connection it is our opinion that when the legislature enacts a statute imposing the duty of enforcement of such statute upon a particular board or officer of the state but fails or neglects to clearly prescribe and incorporate in the Act the mode of enforcement, that such officer or board may adopt any fair and reasonable mode of enforcement designated to effectuate the purposes of the Act.* In other words, when a duty is imposed upon a particular officer or board in express terms such other duties are implied as are necessary to carry into effect those that are expressed."
>
> "Such, we think is the effect of the rule laid down in the case of Morse v. Granite County, 44 Mont. 78, [fol. 172] 119 Pac. 286, and followed in Fisher v. Stillwater County, 81 Mont. 31, 261 Pac. 607; Arnold v. Custer County, 83 Mont. 130, 269 Pac. 396, and State v. Stark, 100 Mont. 365, 52 Pac. (2d) 890.

That language has no support in the facts, and no support in the law.

No support in the facts—for the omission in the statute is not omission of a "mode of enforcement," but of a *method of taxation.*

No support in the law,—because the duty of apportionment is not a mere administrative rule-making authority,

but a duty of substantive law, not of a rule-making agency.

And this Court, up to now, has uniformly insisted on the strict construction of taxing statutes:

Shubert v. Glacier County, 93 Mont. 160, 18 Pac. (2d) 614;
Vennekolt v. Lutey, 96 Mont. 72, 28 Pac. (2d) 452;
Mills v. State Board of Equalization, 97 Mont. 13, 33 Pac. (2d) 563;
State ex rel. Whitlock v. Board of Equalization, 100 Mont. 72, 45 Pac. (2d) 684;
Montana Life Ins. Co. v. Shannon, 106 Mont. 500, 78 Pac. (2nd) 946;
Vantura v. Montana Liquor Control Board, 113 Mont. 265, 124 Pac. (2nd) 569;
U. S. Gypsum Co. v. State Board of Equalization, 116 Mont. 275, 149 Pac. (2nd) 774.

And See: Sutherland, Statutory Construction (3rd Ed. Horack) Ch. 67, Secs. 6701 and 6705.

None of the four (4) cases cited in the opinion are applicable, because none of them relate to the taxing power, or present a situation where an administrative tribunal is permitted to invent a method of tax apportionment, or to select between possible methods of tax apportionment, or authorize the court to change the words of a statute.

In the Morse case, 44 Mont. 78, it was shown that the [fol. 173] Board of County Commissioners had express statutory authority to build a Court House, and, also, to issue bonds.

In the *Fisher case*, 81 Mont. 31, the Court found that "the law authorizes the expenditures," *and this finding is supported by the most explicit terms of the statute itself.*

In the *Custer County case*, 83 Mont. 130, this Court pointed out that the express terms of the statutes gave the County Board implied authority for its acts, *saying of the statutes, "We do the italicizing and direct special attention to the italicized words."*

In the *Stark case*, 100 Mont. 365, the plumbing board was told by the statute to give examinations to would-be plumbers and complaint was made that there were no standards specifying the nature of the examination. The Court found *that the Act itself* indicated the nature of the examination by requiring examiners to be versed in modern

sanitary plumbing and sewage and applicants to be examined on their fitness to engage in the business.

But Section 3847.27, in express terms, commands the Board to lay a tax on

> "the gross operating revenue of such carrier."

The statute commands that, and that alone. It is not a question of the statute omitting to fill in details. The question is, has the Board the authority to do what the statute commands it not to do, i. e.,

> "to lay a tax on anything less than 'the gross operating revenue' "?

The opinion says "*yes . . . the Board can lay a tax on Montana revenues only, and it can follow any method it pleases to determine what are Montana revenues.*"

That is the vice of the opinion—that the Board can invent [fol. 174] any method it pleases to determine what are gross operating revenues in Montana. We challenge counsel to produce a single case upholding such a conclusion.

Since the $10.00 flat per vehicle tax laid under Section 3847.16 is not laid for construction, maintenance, repair or supervision of highways, but solely because Aero operates a motor vehicle over the highways—irrespective of any revenue accruing from the operation—it is obvious that it, too, is a mere tax for the privilege of operating *in* a motor vehicle in interstate commerce and as such falls under the very language of Justice Brandeis quoted by the Court in the opinion.

Conclusion

In conclusion, it is respectfully submitted that a complete rehearing of all the issues herein should be had because,

I. The opinion is built on misstatements of fact, and consequent misconceptions of law, which, when removed and excised from the opinion, as they must be in the light of the true facts, leave the opinion without any foundation upon which to stand; and,

II. There is no authority in reason, in law, or in judicial precedent, for this Court, or any other American Court, holding that an administrative tribunal has the power on its own motion to invent a method, formula, or rule for apportionment of a tax when the legislature has com-

manded that no apportionment is to be attempted, and in any case, has set no standard, rule or formula for any apportionment.

III. The decision of Judge Lynch should be affirmed, for if that is not done the doctrine of non delagability of [fol. 175] the power to tax is nullified, and an administrative tribunal given the power to invent a tax which only the legislature may do, consistent with the Federal and State Constitutions.

Submitted with respect, and in confidence that the Court desires naught but truth in its opinions.

Edmond G. Toomey, Attorney for Petitioner.

Service of the foregoing petition for rehearing, and receipt of a true copy thereof, is admitted this 8th day of July, 1946.

Edwin S. Booth, Sec.-Counsel, Attorneys for Board of R. R. Commissioners.

[fol. 176] IN THE SUPREME COURT OF MONTANA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed September 19, 1946

The petition for rehearing in the above entitled cause is hereby denied.

Done this 19th day of September, 1946.

Carl Lindquist, Chief Justice. C. F. Morris, Hugh R. Adair, Albert H. Angstman, Associate Justices.

[File endorsement omitted.]

[fol. 177] [File endorsement omitted]

IN THE SUPREME COURT OF MONTANA

[Title omitted]

CERTIFIED COPY OF JUDGMENT ON REMITTITUR, RETURNED BY DISTRICT COURT TO SUPREME COURT—Filed December 16, 1946

[fol. 178] IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF SILVER BOW

No. 38175

BOARD OF RAILROAD COMMISSIONERS of the State of Montana, Paul T. Smith, Horace F. Casey and Austin B. Middleton, as members of and constituting the Board of Railroad Commissioners of the State of Montana, Plaintiffs,

vs.

AERO MAYFLOWER TRANSIT COMPANY a corporation, Defendant

JUDGMENT ON REMITTITUR—Filed October 28, 1946

Whereas, on the 31st day of August, 1945, an Amended Judgment was entered in the above entitled cause and both parties having appealed from said Amended Judgment and the portion thereof adverse to each of them, to the Supreme Court of the State of Montana, and remittitur of said Court having been filed herein on the 21st day of September, 1946, and it appearing that "The judgment of the lower court in restraining the Company from operating its vehicles over the highways of Montana until it shall have paid the exactions imposed pursuant to section 3847.16 Revised Codes, as set out in such judgment, is affirmed, and that as to the order of the lower court contained in said judgment restraining the Board from enforcing the exactions imposed upon the Company by section 3847.27, Revised Codes, the cause is remanded with instructions to vacate and set aside such order, and enter judgment in favor of the Board in accordance with this opinion."

Now therefore, by reason of the law and the remittitur [fol. 179] aforesaid, it is hereby ordered, adjudged and decreed:

1. That the defendant be, and it hereby is, restrained and enjoined from operating its motor vehicles over and upon the public highways of the State of Montana until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Two Hundred Fifty Dollars ($250.00), together with interest thereon from the 1st day of January, 1938 until paid; the sum of Four Hundred Dollars ($400.00), together with interest thereon, from the 1st day of January, 1939 until paid; and the sum of Four Hundred Forty Dollars ($440.00) together with interest thereon, from the 1st day of January, 1940 until paid, being the fees due for the years 1937, 1938 and 1939, respectively, under the provisions of Section 3847.16, Revised Codes of Montana, 1935.

2. That the defendant be, and it hereby is, restrained and enjoined from operating its motor vehicles over and upon the public highways of the State of Montana until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Sixty-four and 11/100 Dollars ($64.11) together with interest thereon, from the 1st day of January, 1937 until paid; the sum of Three Hundred thirty-three and 99/100 Dollars ($333.99) together with interest thereon from the 1st day of January, 1938 until paid; the sum of Six Hundred Dollars ($600.00) together with interest thereon from the 1st day of January, 1939 until paid; and the sum of Six Hundred Sixty Dollars ($660.00), together with interest thereon from the 1st day of January, 1940 until paid, being the fees due for the years 1936, 1937, 1938 and 1939, respectively, under the provisions of Sections 3847.27, Revised Codes of Montana, 1935.

Done in Open Court this 28th day of October, 1946.
[fol. 180] Jeremiah J. Lynch, Judge.

[Clerk's certificate to foregoing paper omitted in printing.]

[fol. 181] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS—Filed December 16, 1946

[fol. 182] To The Hon. Carl Lindquist, The Chief Justice of the Supreme Court of the State of Montana:

Your petitioner, Aero Mayflower Transit Company, a corporation, respectfully shows:

1. The petitioner, Aero Mayflower Transit Company, a corporation organized and existing under the laws of the State of Kentucky, is the defendant and the appellant in the above entitled cause.

2. Petitioner feeling itself aggrieved by the final judgment and decree in and of the Supreme Court of the State of Montana entered therein on the 19th day of September, 1946, after denial by said court on September 19, 1946, of its petition for rehearing, now for the reasons set forth in its Assignment of Errors which is filed herewith, hereby appeals from such final judgment and decree of the Supreme Court of the State of Montana, to the Supreme Court of the United States, and prays that its appeal be [fol. 183] allowed and that the final judgment and decree of the Supreme Court of the State of Montana be reversed and set aside and that judgment be entered in favor of petitioner, appellant as aforesaid, and to that end that a citation be issued in accordance with law and that a transcript of the record, proceedings and exhibits in this cause, duly authenticated by the clerk of the Supreme Court of the State of Montana, under the seal of said Court, may be sent to the Supreme Court of the United States as provided by law; and that an order be made fixing the terms and the amount of bond or other security to be required of your petitioner; and that the execution of said judgment be superseded until final determination of said appeal by the Supreme Court of the United States.

Jurisdiction of the Supreme Court of the United States on appeal is invoked under section 237 (a) of the Judicial Code (28 U.S.C.A., sec. 344 (a), as amended.

The final judgment and decree of injunction restraining the petitioner from operating *in interstate commerce* over the highways of the State of Montana from which judgment and decree an appeal is sought, was rendered in a suit in the highest court of Montana, in which a decision could be had, namely, the Supreme Court of the State of Montana. In that suit there was drawn in question the validity of two separate groups of statutes of the State of Montana, on the ground that each was repugnant to the Constitution of the United States of America, and the decision of the Supreme Court of the State of Montana was in favor of the validity of each of said groups of statutes. The opinion of the Supreme Court of the State was concurred in by four (4) of the five (5) Justices of that Court. One Justice reserved his opinion at the time the majority opinion was [fol. 184] filed, and subsequently filed a dissenting opinion.

The basic suit grew out of an administrative proceeding against petitioner commenced September 19, 1939, by the Board of Railroad Commissioners of the State of Montana, wherein such Board assumed by its order issued October 9, 1939, to cancel and extinguish a "permit" theretofore issued to petitioner by said Board on October 3, 1935, authorizing petitioner to operate in interstate commerce over the highways of Montana, because of the failure of petitioner to pay two (2) different kinds of fees or taxes for the years 1937, 1938 and 1939 (in addition to all other licenses, fees and taxes imposed upon motor vehicles in Montana by successive Acts of the legislative assembly of Montana), in consideration of the use of the public highways of the State, viz.,

First Tax, an annual fee or tax of $10.00 "for every motor vehicle operated by the carrier over or upon the public highways of this state", as enacted in sections 16, 17 and 18 of Chapter 184, Laws of Montana, 1931, now codified as sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, Volume 2, pages 688-689; and

Second Tax, a quarterly fee or tax of one-half of one per cent of the gross operating revenue of the carrier, with a minimum $15.00 annual fee, as enacted in sections 2 and 3 of Chapter 100, Laws of Montana, 1935, now codified as sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, Volume 2, pages 691-692.

Each of the statutes expressly states that the taxes named are "in addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state", or "in addition to all [fol. 185] the other licenses, fees and taxes imposed upon motor vehicles in this state."

Petitioner, who operated, and operates, exclusively in interstate commerce, challenged the application and the constitutionality, under the United States Constitution, of both these taxes in the proceeding before the Board. The Board followed its order assuming to prohibit petitioner from operating in interstate commerce over Montana highways by commencing suit on October 13, 1939, in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, at Butte, as plaintiff, against Aero Mayflower Transit Company as defendant, petitioner here, to secure an injunction prohibiting petitioner from operating its motor vehicles in interstate commerce upon any public highways in the State of Montana until it paid both kinds of taxes to the Board for the years in question. Petitioner Aero challenged the complaint of the Board by demurrers and in answer, by denials, affirmative defenses, and a cross-complaint in which petitioner asserted (a) that the statutes were not intended to apply to its operations which were exclusively in interstate commerce, and (b) that if the statutes were to be so construed they were, and each was, repugnant to the commerce clause, and to the due process and to the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

After trial, the District Court of Silver Bow County, on August 31, 1945, found and adjudged:

> 1. That the annual tax of $10.00 per vehicle "is a valid exercise of the legislative authority and should be obeyed";
>
> 2. That the quarterly tax on the gross revenues of the carrier "is invalid for the reason that it fails to [fol. 186] specify any method by which the gross operating revenue of the defendant (petitioner) in the state for any year may be determined," and for the further reason that the Public Service Commission of the State of Montana, the administrative body collecting the fee "has nothing to do with the regulation and supervision

of motor carriers using the public highways of the State of Montana."

Judgment was entered *restraining the Company*, petitioner here, from operating in interstate commerce over the highways of Montana until it pays the $10.00 per vehicle tax for the years 1937, 1938 and 1939, and, on the other hand, *restraining the Board* from attempting to apply the gross revenue tax to petitioner.

The Board appealed to the Supreme Court of Montana from that part of the judgment holding the gross revenue tax invalid, and the Company appealed from that part of the judgment holding the flat $10.00 per vehicle tax valid. In the Supreme Court the Company again attacked both statutes as repugnant to the commerce clause, and to the due process and equal protection clauses of the Fourteenth Amendment, Constitution of the United States.

In an opinion delivered June 29, 1946, — Mont. —, 172 Pac. (2d) 452, the Supreme Court of the State of Montana (four Justices concurring and one reserving opinion, which was, when delivered on September 19, 1946, a dissent from the views and ruling of the majority) held that both of the statutes imposed valid taxes, and that neither offended the Constitution of the United States or the State of Montana and (a) *affirmed* the judgment of the District Court of Silver Bow County as to the "flat" $10.00 per vehicle annual tax, and (b) *reversed* the judgment of that court as [fol. 187] to the gross revenue tax with directions to set aside such judgment and enter judgment in favor of the Board for the gross revenue tax.

Petition for rehearing was seasonably filed by the Company, petitioner here, on July 8, 1946, and, after issue thereon made by answer of the Board thereto, filed July 15, 1946, denied on the merits by final judgment of the Supreme Court of Montana, entered September 19, 1946, after which the mandate of said Supreme Court was, on remittitur, sent to the District Court of Silver Bow County, Montana, which complied therewith by judgment entered October 28, 1946, restraining the Company, petitioner here, from operating in interstate commerce over the highways of Montana until it paid both taxes for the years 1937, 1938 and 1939, being the years involved in the litigation.

Assignment of Errors

Petitioner, in support of its Petition for Appeal herein, assigns the following errors as grounds for the reversal of the final judgment and decree of the Supreme Court of the State of Montana of September 19, 1946:

A

As respects the "flat" or "straight" $10.00 per vehicle annual tax imposed by sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935:

I

The Supreme Court of the State of Montana erred in holding that the tax assailed is not in violation of the commerce clause of, and also, the due process clause of the Fourteenth Amendment to, the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until the tax is paid.

[fol. 188]

II

The Supreme Court of the State of Montana erred in holding that the tax assailed is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until the tax is paid.

III

The Supreme Court of the State of Montana erred in gratuitously reading into section 3847.16, Revised Codes, Montana, 1935, and its related section 3847.17, the assumption that the tax was exacted to build, maintain and supervise the highways of Montana and using that assumption to justify the exaction against petitioner, engaged exclusively in interstate commerce, when the said statutes expressly negative any such purpose.

IV

The Supreme Court of Montana erred in sustaining the "flat" or "straight" $10.00 per vehicle tax as a direct burden on interstate commerce, and prohibiting petitioner from operating exclusively in interstate commerce unless

such tax is paid, since the tax *on its face* bears no relation whatever to the use of the public highways of the State of Montana by petitioner.

V

The Supreme Court of Montana erred in sustaining the "flat" or "straight" $10.00 per vehicle tax, the proceeds of which, by the words of section 3847.17, Revised Codes of Montana, 1935, "shall be available for the purpose of defraying the expenses of the administration" of the Montana Motor Act "and the regulation of the businesses herein described," as against petitioner, who operates in [fol. 189] interstate commerce only, since the tax *on its face* bears no relation to the asserted uses or purposes of its levy.

VI

The Supreme Court of Montana erred in sustaining the "flat" or "straight" $10.00 per vehicle tax as compensation for the use of the highways of Montana, when the tax is by its terms and necessary effect, and despite its self-serving pretensions, is a direct state tax levied for the privilege of carrying on interstate commerce over the public highways of Montana.

VII

The Supreme Court of Montana erred in applying the "flat" or "straight" tax of $10.00 per vehicle against petitioner's exclusive interstate operations, since the tax on its face is not in any manner related to or apportioned to, such operation.

VIII

The Supreme Court of Montana erred in mis-reading and in mis-applying to the Montana statutes in question, sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, the decisions of the Supreme Court of the United States in,

Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. 702, 71 Law Ed. 1199;

Interstate Transit, Incorporated, v. Lindsey, 283 U. S. 183, 51 Sup. Ct. 380, 75 Law Ed. 953; and

South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177, 58 Sup. Ct. 510, 82 Law Ed. 734.

IX

The Supreme Court of Montana erred in holding that sections 3847.16, 3847.17 and 3847.18 are applicable to interstate commerce, or petitioner's exclusive interstate operations at all.

B

[fol. 190] *As respects the Quarterly Gross Revenue tax on the interstate carriers' gross revenues, imposed by sections 3847.27 and 3847.28, Revised Codes of Montana, 1935:*

I

The Supreme Court of Montana erred in holding that the quarterly gross revenue tax assailed is not in violation of the commerce clause of, and, also of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until such tax is paid.

II

The Supreme Court of Montana erred in holding that the quarterly gross revenue tax assailed is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until such tax is paid.

III

The Supreme Court of Montana erred in holding that the State of Montana has power, as a condition of permitting petitioner to engage in interstate commerce over the public highways, to impose a tax upon petitioner who operated over its public highways exclusively in interstate commerce, based upon gross receipts to petitioner derived solely from interstate commerce, absent any attempt by the legislature at apportionment, a method, formula or device, for apportionment.

IV

The Supreme Court of Montana erred (a) in gratuitously assuming, in the face of section 3847.27, Revised Codes, Montana, 1935, stating that the tax is imposed on the gross operating revenue of the carrier, that the tax is [fol. 191] imposed only on "gross revenue derived from

operations in Montana," however determined, and (b) in itself endeavoring to invent or supply a taxable base of gross revenues as between Montana and the national area outside Montana, when the statute refers to "the gross operating revenue of the carrier," i. e., this petitioner's total interstate revenues, as the taxable base.

V

The Supreme Court of Montana erred in holding that the State of Montana has power to levy a tax on the interstate revenues of a carrier engaged exclusively in interstate commerce, as a condition of that carrier operating over the highways of Montana, when the legislative assembly has utterly failed to provide, any method whatever of relating the tax to the use, and permits a Board or unidentified persons to invent any method of apportionment in any single instance.

VI

The Supreme Court of Montana erred in gratuitously assuming, as a premise to its conclusion upholding the gross revenue tax that there are gross revenues derived by petitioner "'from operations in Montana'' to which the tax could be made to apply, in the face of the fact as found by said court, that petitioner operates exclusively in interstate commerce, and derives its revenues solely from that commerce, and, on such gratuitous assumption, prohibiting petitioner from operating in interstate commerce.

VII

The Supreme Court of Montana erred in upholding the validity of the gross revenue tax against the challenge of the constitutional objections made by petitioner *when the Act utterly fails to provide, or to suggest, any method of* [fol. 192] *apportionment between "gross revenue derived from operations in Montana" and gross revenue elsewhere.*

VIII

The Supreme Court of Montana erred in its attempt to immunize the statute against the constitutional objections, in that, under the guise of statutory construction, it assumed to legislate into the statute a restriction confining the operation of the gross revenue tax to "gross revenue

derived from operations in Montana," when the legislative assembly by the words of the statute applied the tax to "the gross operating revenue of the carrier", and the Supreme Court of the United States can not be bound by any such perversion of language.

IX

The Supreme Court of Montana erred in that, after assuming to legislate into the statute a restriction confining the operation of the tax to "gross revenue derived from operations in Montana," it found no method provided in the statute for ascertaining such alleged Montana revenues, i.e., by road mileage traveled in the state, number of vehicles, road hours, cargo, volume of traffic, ton miles, vehicle miles, or any other factor or combination of factors, *and yet enjoined petitioner from operating exclusively in interstate commerce until it paid a tax which could not be ascertained,* except by guesswork by some unidentified agency.

X

The Supreme Court erred in that it finally concluded that the $15.00 minimum per vehicle annual tax imposed *by the gross revenue statute* could be put into effect "even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is [opinion apparently omits language here] not provided", thus mak- [fol. 193] ing such tax an arbitrary minimum charge for the naked privilege of engaging in interstate commerce, in violation of the commerce clause and the Fourteenth Amendment to the Constitution of the United States.

XI

The Supreme Court of Montana erred in holding that petitioner, engaged exclusively in interstate commerce, may be subjected to a percentage tax on gross revenues, as a condition of using the public highways of Montana in interstate commerce, when no formula, guide, standard or measure of tax is stated by the statute, or when no agency of the State is delegated authority, under legislative safeguards, to compute such tax on stated or ascertainable factors.

XII

The Supreme Court of Montana erred in construing sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, to be applicable to interstate commerce, at all.

Wherefore, and because of such errors, appellant prays:

1. That this Petition for Appeal be allowed, and Citation issue to Appellee, as aforesaid;

2. That said final decision, judgment and decree of the Supreme Court of the State of Montana, entered September 19, 1946, be reversed and until final determination hereof, said judgment be stayed and superseded;

3. That each of the groups of statutes assuming to impose the several taxes assailed be declared unconstitutional, as being repugnant to the commerce clause, to the equal protection of the law clause, to the due process clause, of the Fourteenth Amendment to the Constitution of the United States, and clause 3 of section 8 of Article I of the Constitution of the United States;

4. That the Clerk of the Supreme Court of the State of [fol. 194] Montana be directed to prepare and certify a Transcript of the Record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within a time to be fixed as required by law;

5. Appellant herewith tenders bond, in such terms and sum as the Court may require in the premises responsive to the prayer hereof, and prays approval thereof.

Done and dated at Helena, Montana, this 16th day of December, 1946, and filed in said Supreme Court of Montana and presented to the Chief Justice thereof on said 16th day of December, 1946.

Edmond G. Toomey, Helena, Montana; Emmett S. Huggins, Indianapolis, Indiana, Attorneys for Petitioner.

[fols. 195-266] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL AND FIXING BOND ON STAY—Filed December 16, 1946

It appearing to the undersigned that the defendant, Aero Mayflower Transit Company, a corporation, has filed its petition for appeal to the Supreme Court of the United States from the final judgment and decree of injunction of the Supreme Court of Montana in the above entitled cause, and has filed therewith its Assignment of Errors, Prayer for Reversal, and for Stay of Proceedings on said Judgment, and also its Statement as to the Jurisdiction of the Supreme Court of the United States, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment and decree of injunction in question, all as provided by the applicable statutes and the rules of said Supreme Court of the United States, and the petitioner's Assignment of Errors and [fol. 267] Statement having been presented to the undersigned as required,

It is Ordered, and this does Order that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the final judgment and decree of injunction of the Supreme Court of Montana rendered in this cause, dated on the 19th day of September, 1946, and that defendant, as appellant, give a bond with good and sufficient security in the sum of Twenty Thousand Dollars ($20,000) that it, as appellant shall prosecute its appeal to effect, and answer all damages and costs if it fail to make the appeal good, to be approved by the undersigned.

It is further Ordered, and this does Order that all proceedings on said final judgment be, and they are hereby arrested and stayed until the final determination of said appeal, on mandate from the Supreme Court of the United States to the Supreme Court of Montana.

It is further Ordered and this does Order, that the Clerk of the Supreme Court of the State of Montana shall within

sixty (60) days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the Supreme Court of Montana, a true copy of the material parts of the record, including the assignment of errors and any opinions delivered in the case, said record to be designated by praecipe, or stipulation, of counsel for appellant and appellees, all in accordance with Rule X of the Rules of the Supreme Court of the United States.

Done and dated this 16th day of December, 1946.

Carl Lindquist, Chief Justice of the Supreme Court of the State of Montana.

[fols. 268-270] Supersedeas bond on appeal for $20,000.00, approved and filed Dec. 16, 1946, omitted in printing.

[fols. 271-272] Citation in usual form, filed Dec. 16, 1946, omitted in printing.

[fols. 273-293] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR INCLUSION IN THE RECORD OF JUDGMENT OF DISTRICT COURT—Filed January 13, 1947

To the Honorable the Clerk of the Supreme Court of the State of Montana:

The Appellees hereby request the incorporation into the transcript of the record on this appeal, the attached certified copy of the judgment of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, made and rendered on the 3rd day of January, 1947, which said judgment cancels the judgment

of the District Court, dated October 28, 1946, and appearing on pages 159 and 160 of the record.

[fol. 294] Dated this 8th day of January, 1947.

R. V. Bottomly, ESB, Attorney General of the State of Montana; Clarence Hanley, ESB, Asst. Attorney General of the State of Montana; Edwin S. Booth, Special Assistant Attorney General and Secretary-Counsel, Board of Railroad Commissioners of the State of Montana.

Acknowledgment of service of the foregoing Praecipe admitted and receipt of copy acknowledged, this 13th day of January, 1947.

Emmett S. Huggins, Edmond G. Toomey.

[fol. 295] In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

Cause No. 38175

Board of Railroad Commissioners of the State of Montana, Paul T. Smith, Leonard C. Young and Horace F. Casey, as members of and constituting the Board of Railroad Commissioners of the State of Montana, Plaintiffs,

vs.

Aero Mayflower Transit Company, a corporation, Defendant

Judgment on Remittitur

Whereas, on the 31st day of August, 1945, an Amended Judgment was entered in the above entitled cause and both parties having appealed from said Judgment and the portion thereof adverse to each of them, to the Supreme Court of the State of Montana, and remittitur of said Court having been filed herein on the 21st day of September, 1946, and it appearing that "The judgment of the lower court in restraining the Company from operating its vehicles over the highways of Montana until it shall have paid the exactions imposed pursuant to section 3847.16, Revised Codes, as set out in such judgment, is affirmed. As to the

order of the lower court restraining the Board from enforcing the exactions imposed upon the company by section 3847.27, Revised Codes, the cause is remanded with instructions to vacate and set aside such order, and enter judgment in favor of the Board in accordance with this opinion."

And whereas, a Judgment on Remittitur was made and entered on the 28th day of October, 1946, and subsequently, [fol. 296] by a Peremptory Order of the Supreme Court of the State of Montana, dated the 31st day of December, 1946, the lower Court was ordered to vacate and cancel its judgment made and rendered on the 28th day of October, 1946 and to enter judgment in conformity therewith.

And Whereas, the temporary restraining order heretofore issued was set aside and vacated by order of this Court, made and entered on the 5th day of December, 1939, on the condition that the defendant Company file a bond to secure payment to the plaintiff, Board of Railroad Commissioners, and/or the State of Montana, "any and all fees involved in this action and any and all fees which shall accrue during the pendency of the litigation consequent thereon, the payment of which shall, on final determination of said litigation be determined to be due and owing by the defendant to said plaintiff and/or the State of Montana, under the provisions of Section 3847.16 and 3847.27, Revised Codes of Montana, 1935, if at all;" and after filing security as required, the defendant company was authorized by the Court to, and it did operate its motor vehicles over the highways of the State of Montana, and the fees due under the provisions of Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935, for such subsequent operations are due, owing and wholly unpaid.

Now, Therefore, by reason of the law, the remittitur and order aforesaid, It Is Hereby Ordered, Adjudged and Decreed:

1. That the Amended Judgment made and enfered in this Court on the 31st day of August, 1945, and the Judgment on Remittitur made and entered on the 28th day of October, 1946, be, and they are hereby set aside and superseded by this Judgment.

[fol. 297] 2. That the defendant be, and it hereby is, restrained and enjoined from operating its motor vehicles over and upon the public highways of the State of Montana

until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Two Hundred Fifty Dollars ($250.00), together with interest thereon from the 1st day of January, 1938 until paid; the sum of Four Hundred Dollars ($400.00), together with interest thereon from the 1st day of January, 1939 until paid; the sum of Four Hundred Forty Dollars ($440.00), together with interest thereon from the 1st day of January, 1940 until paid, being the fees due for the years 1937, 1938, and 1939, respectively, under the provisions of Section 3847.16, Revised Codes of Montana, 1935; and until it has made report to the plaintiff Board, showing the vehicles operated on the highways of the State of Montana in the year of 1940, and each subsequent year, and paid to the plaintiff Board the fees due and owing under the provisions of Section 3847.16, Revised Codes of Montana, 1935, together with interest thereon from the 1st day of January following, on the sums due for each said year; and until it has made full compliance with the provisions of Section 3847.16, Revised Codes of Montana, 1935.

3. That the defendant be, and it hereby is restrained and enjoined from operating its motor vehicles over and upon the public highways of the State of Montana until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Sixty-four and 02/100 Dollars ($64.02), together with interest thereon from the 1st day of January, 1938 until paid; the sum of Six Hundred Dollars ($600.00), together with interest thereon from the 1st day of January, 1939 until paid; the sum of Six Hundred Sixty Dollars ($660.00), together with interest thereon from [fol. 298] the 1st day of January, 1940 until paid, being the fees due for the years 1936, 1937, 1938 and 1939, respectively, under the provisions of Section 3847.27, Revised Codes of Montana, 1935; and until it has made report to the plaintiff Board, showing the vehicles operated on the highways of the State of Montana in the year of 1940, and each subsequent year, and paid to the plaintiff Board the fees due and owing under the provisions of Section 3847.27, Revised Codes of Montana, 1935, together with interest thereon from the 1st day of January following, on the sums due for each said year; and until it has made full compliance with the provisions of Section 3847.27, Revised Codes of Montana, 1935.

4. That plaintiff have and recover its costs expended herein in the sum of One Hundred Eighty-seven and 25/100 Dollars ($187.25).

Dated this 3rd day of Jan., 1947.

Jeremiah J. Lynch, District Judge.

Clerk's Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fols. 299-301] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

CERTIFICATE OF CLERK OF SUPREME COURT OF MONTANA TO TRANSCRIPT OF RECORD ON APPEAL

UNITED STATES OF AMERICA,
State of Montana, ss:

I, Frank Murray, undersigned, the duly and regularly elected, qualified and acting Clerk of the Supreme Court of the State of Montana, wherein the above entitled action was finally determined by final judgment of said Court, *Do Hereby Certify:* That I have carefully compared the foregoing Transcript of Record on Appeal from the Supreme Court of the State of Montana to the Supreme Court of the United States, consisting of Index to Transcript, being Pages (i) to (iii), inclusive, and Transcript of Record, being pages 1 to 306, inclusive, wherein is incorporated Statement by Appellant as to Jurisdiction Under Rule 12, with Appendices "A" and "B" thereto at Pages 195 to 265, and Statement by Appellees of Grounds in Opposition to Appellate Jurisdiction Pursuant to Rule 12, with Appendix, at Pages 275 to 291, with the original papers and documents in said cause on file and of record in my office, and in my custody therein, and that said Transcript of Record is [fol. 302] a full, true and correct copy of all the said original papers and documents, and of each one thereof in said cause, so filed and of record in my office of Clerk of the Supreme Court of the State of Montana, as required to be incorporated in said transcript pursuant to praecipe of appellant found at pages 304-5 of said transcript, and as required by

Rules 10 and 12 of the Revised Rules of the Supreme Court of the United States.

I further certify that the Honorable Carl Lindquist, Chief Justice of the Supreme Court of the State of Montana, who was the Justice of said Court allowing said appeal and who signed the citation on appeal, has taken proper security for costs and for stay on appeal consisting of a good and sufficient supersedeas bond in the sum of Twenty Thousand ($20,000.00) Dollars, the original bond being on file in my said office, all as required by Rule 36 of the Revised Rules of the Supreme Court of the United States, and that all further proceedings on the final judgment of the Supreme Court of Montana in said cause have been stayed pending final determination of said appeal.

I further certify that the practice before, and the rules of, the Supreme Court of the State of Montana are such that on appeal to said Court from the district courts of said state, the appellant makes and assigns specifications or assignments of error in the brief of appellant, and that, accordingly, excerpts from the briefs of appellants (each party having been an appellant in said Supreme Court of Montana) containing such specifications or assignments of error are incorporated into this transcript, at pages 128C, 128D and 128E.

In witness whereof, I have hereunto set my hand and [fol. 303] affixed the seal of the Supreme Court of the State of Montana, at Helena, the capital of said State, this 5th day of February, 1947.

Frank Murray, Clerk of the Supreme Court of the State of Montana. (Seal of Supreme Court of State of Montana.)

[fol. 304] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR PORTIONS OF RECORD TO BE INCORPORATED IN TRANSCRIPT ON APPEAL—Filed December 16, 1946

To the Honorable, the Clerk of the Supreme Court of the State of Montana:

The appellants hereby indicate the portions of the record to be incorporated into the transcript of record on this

appeal, and request that you proceed to prepare said record including all the portions now designated, viz:

1. The complete Transcript of Record on Appeal to the Supreme Court of Montana from the District Court of Silver Bow county, Montana, together with all exhibits and Bills of Exception, *excluding, however,* the index to said transcript, and all routine, interim orders of the trial court setting time for hearings, continuing hearings, granting additional time to the parties, and omitting as to any paper [fol. 305] after the complaint, repetition of the full title of Court and Cause; and appellant's Assignment of Errors in its Brief in the Supreme Court of Montana.

2. Opinion and decision of the majority of the Supreme Court of Montana, together with the dissenting opinion of Mr. Justice Cheadle.

(Note: The foregoing are included in the Statement as to Jurisdiction as Appendix A, and you are requested to include such opinions in the Transcript at such point.)

3. Petition for Rehearing.

(Note: This petition is included in the Statement as to Jurisdiction as Appendix B, and you are requested to include such petition in the Transcript at such point.)

4. Order Denying Petition for Rehearing.

5. Certified copy of Judgment of trial court under mandate from Supreme Court of Montana, as filed in the said Supreme Court.

6. Petition for Appeal, and, therewith, Assignment of Errors.

7. Statement as to Jurisdiction.

8. Order Allowing Appeal and fixing Bond.

9. Bond on Appeal.

10. Citation.

11. Statement directing attention to Rule 12 of the Rules of the Supreme Court of the United States.

12. Statement by Appellees—Objection and Motion to Dismiss.

Done and dated this 16th day of December, 1946.

Emmett S. Huggins, Edmond G. Toomey, Attorneys for Appellant.

[fol. 306] ACKNOWLEDGMENT OF SERVICE OF TRANSCRIPT OF RECORD ON APPEAL

Service of Transcript of Record on Appeal, as certified by Clerk of the Supreme Court of the State of Montana, and receipt of a true copy thereof, is hereby admitted this 5th day of February, 1947.

R. V. Bottomly, ESB, Attorney General of the State of Montana; Clarence Hanley, ESB, Assistant Attorney General of the State of Montana; Edwin S. Booth, Counsel, Board of Railroad Commissioners of the State of Montana.

[fol. 307] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed February 10, 1947

Comes now the Appellant, and adopts its Assignment of Errors as its Statement of the Points to be Relied Upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated February 5th, 1947.

Emmett S. Huggins, Indianapolis, Indiana; Edmond G. Toomey, Helena, Montana, Attorneys for Appellant.

Service of the foregoing Statement of Points and Designation of Parts of Record to be Printed, and receipt in hand of a true copy thereof, is hereby admitted this 5th day of February, 1947.

R. V. Bottomly, ESB, Attorney General of Montana; Clarence Hanley, ESB, Assistant Attorney General of Montana; Edwin S. Booth, Counsel, Board of Railroad Commissioners of Montana, Attorneys for Appellees.

[fols. 307a] [File endorsement omitted.]

[fol. 308] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 1003

ORDER NOTING PROBABLE JURISDICTION—March 10, 1947

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: Enter Edmond G. Toomey. File No. 51,867. Montana, Supreme Court. Term No. 1003. Aero Mayflower Transit Company, Appellant, vs. Board of Railroad Commissioners of the State of Montana, et al. Filed February 10, 1947. Term No. 1003, O. T. 1946.